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MAR 13 2003
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No. 02-6683

In The
Supreme Court of the United States

HERNAN O'RYAN CASTRO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

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7/5/94	United States District Court, Southern District, Savannah Division, Motion for New Trial – Pursuant to Federal Rule of Civil Procedure 33;
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5/7/02 United States Court of Appeals for the Eleventh Circuit, Opinion of Eleventh Circuit Court of Appeals;

EXHIBIT A

United States District Court

Southern District of Georgia

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	**(For Offenses Committed On or After November 1, 1987)**
Hernan O'Ryan Castro	Case Number: CR491-142-03
(Name of Defendant)	Mark Jenkins and Pomeroy Williams Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[x] was found guilty on count(s) 1 and 2 _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21: 846	Conspiracy to Possess With Intent to Distribute and Distribute Cocaine	07-30-91	1
21:960 and 963	Conspiracy to Import into the U.S. from Outside Territorial Limits thereof, Multi-kilo Quantities of Cocaine Hydrochloride	07-30-91	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) 1 and 2, which shall be due [x] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 548-43-8812

Defendant's Date of Birth: 04-10-55

Defendant's Mailing Address:

5 Santa Ana Avenue
Daly City, California 94015

Defendant's Residence Address:

U.S. Bureau of Prisons

July 10, 1992
Date of Imposition of Sentence

/s/ John F. Nangle
Signature of Judicial Officer

Honorable John F. Nangle
United States District Judge
Name & Title of Judicial Officer

JULY 14, 1992
Date

ATTEST: A TRUE COPY

Certified to JUL 15 1992 19__

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 240 months as to each of Counts 1 and 2, to be served concurrently.

[x] The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be allowed to serve his period of incarceration at either FCI Lompoc, CA, FCI Terminal Island, CA, or FCI Pleasanton, CA.

[x] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at _____ a.m. / p.m. on _____.

[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.

[ ] as notified by the United States marshal.

[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____,
with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

_____

HERNAN O. CASTRO
Reg. # 73026-011
P. O. Box 3007
San Pedro, CA 90731-0207

In Pro Se

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

UNITED STATES OF AMERICA, Plaintiff, v HERNAN O'RYAN CASTRO, Defendant.	) CR 491-142)) MOTION FOR NEW) TRIAL PURSUANT) FEDERAL RULES) OF CRIMINAL) PROCEDURES,) RULE 33.)) (Filed Jul. 11, 1994)

COMES NOW HERNAN O'RYAN CASTRO, in Pro Se, a Defendant herein, and moves this Honorable Court to order a new trial, in the case of Defendant, pursuant to Federal Rules of Criminal Procedures, Rule 33.

In the alternative, Defendant requests an evidentiary hearing.

This 5th day of the month of July, 1994.

/s/ Hernan O. Castro
HERNAN O. CASTRO
IN PRO SE

_____

STATEMENT OF JURISDICTION AND TIMELINESS

This Court has jurisdiction to entertain a motion for new trial pursuant to Federal Rules of Criminal Procedures, Rule 33.

> "Evidence discovered post trial [ ] is properly considered by the district court in a motion for a new trial pursuant to Fed. R. Crim. Pro. 33." [*U.S. v. Bascaro*, 742 F.2d 1335, 1344 (11th Cir. 1984)]

Because Defendant's motion for new trial is based on newly discovered evidence, it can be presented to this court within two years from final judgment.

> "A motion for new trial based on the grounds of newly discovered evidence may be made only before or within two years of final judgment." [Fed. R. Crim. Pro., Rule 33]

AND,

> "For the purpose of [Fed. R. Crim. Pro. 33], 'final judgment' is defined as the date on which the appellate process is terminated, and the appellate process is terminated when appellate court issues its mandate of affirmance." [*U.S. v. Cook*, 705 F.2d 350 (D.C. Cir., 1983)]

The Eleventh Circuit United States Court of Appeals denied Defendant's Petition for Rehearing on May 11, 1994.[1A] The Mandate was stayed pending Defendant's

[1A] United States Court of Appeals for the Eleventh Circuit's denial of Defendant's Petition for Rehearing of his direct appeal is attached hereto and incorporated herein by reference as Exhibit A1.

Petition for Writ of Certiorari to the United States Supreme Court.

STATEMENT OF ISSUES

A. The government violated the *Brady* doctrine, as held in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by not disclosing the government's agreement with its main witness against Defendant.

B. The government violated the *Giglio* doctrine, as held in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), when it knowingly introduced perjured testimony by two of its witnesses, at Defendant's trial.

STANDARD OF REVIEW

Unlike common cases of motion for new trial, based on newly discovered evidence, which require a more stringent four prong inquiry[1], claims of violation of the *Brady-Giglio* doctrines, use a more lenient standard.

A. A defendant that seeks a new trial based on a *Brady* violation, must show:

[1] A defendant that seeks a new trial based on newly discovered evidence normally must show that: "(1) the evidence must be newly discovered and have been unknown to the defendant at the time of the trial; (2) the evidence must be material, and not merely cumulative or impeaching; (3) the evidence must be such that it probably produce an acquittal; and (4) failure to learn of such evidence must not be due to lack of diligence on the part of the defendant." [*U.S. v. Sjeklocha*, 843 F.2d 485, 487 (11th Cir. 1988), cit. omitted]

(1) That the government possessed evidence favorable to the defendant (including impeaching evidence); (2) that the defendant does not possess the evidence, nor could he obtain it himself with any reasonable diligence; (3) that the prosecutor suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [U.S. v. Swindall, 971 F.2d 1531, 1556 (11th Cir. 1992), cit. omitted]

B. A defendant that seeks a new trial based on the government's knowing use of false testimony is required to prove:

(1) That the prosecution's case included perjured testimony, (2) that the prosecution knew or should have known of the perjury, and (3) that there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. [*U.S. v. Agurs*, 427 U.S. 97, 103, 49 L.Ed.2d 312, 349, 965 S.Ct. 2392, 2397 (1976)]

INTRODUCTION.

Defendant HERNAN O'RYAN CASTRO, was convicted on April 10, 1992, after a five days jury trial, of Conspiracy to Possess with Intent to Distribute Cocaine, in violation of 21 U.S.C. §§ 841 and 846, and of Conspiracy

to Import Cocaine, in violation of 21 U.S.C. §§ 952, 960 and 963[2].

STATEMENT OF FACTS

On November 19, 1991, Castro filed a Motion for Disclosure of Impeaching Evidence[3].

During Castro's trial the Government's main witness against him was Government informant Lynn Lowe.

On page one of Castro's Motion for Disclosure of Impeaching Evidence [Exhibit B], Castro requested:

"Any and all records and information revealing prior misconduct or bad acts attributed to each witness."

And,

"Any and all considerations or promises of consideration given to or on behalf of the witness. . . ."

On page two of the same motion [Exhibit B], Castro requested:

"Any and all criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against the witness, and any civil, tax court, court of claims, administrative, or

---

[2] Castro's Order of Judgment and Commitment attached hereto and incorporated herein by reference as Exhibit A.

[3] Attached hereto and incorporated herein by reference as Exhibit B.

other pending or potential attributed to each witness."

Finally, on page three, of the same motion [Exhibit B], Castro requested:

"Any and all other records and/or information which could arguably be helpful or useful to the defense in impeaching or otherwise detracting from probative force of the Plaintiff's evidence or could arguably lead to such records or information."

On December 2, 1991, the Government filed a Preliminary Statement Re Discovery[4], in response to defendants' various pre-trial motions.

On page four of the Government's response [Exhibit C], it states:

"Also seven (7) days prior to the trial the government will file an exculpatory evidence and *Brady-Giglio* notice. Criminal histories of any government witnesses will be set forth. . . . "

The Government never filed any information with regard to Lynn Lowe's prior bad acts, nor about her Immunity Agreement[5].

During Junji Yamamoto's trial (one of Castro's co-defendants, who was tried separately, on March 10 and 11, 1993), Government witness Lynn Lowe testified that she

[4] Attached hereto and incorporated herein by reference as Exhibit C.

[5] Attached hereto and incorporated herein by reference as Exhibit D.

had entered into an Immunity Agreement with the United States Attorney's Office for the Southern District of West Virginia, in November 16, 1987[6].

I. THE GOVERNMENT WITHHELD *BRADY* MATERIAL.

It is well established that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." [*United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989), quoting *Brady v. Maryland*, supra, 373 U.S. at 87.] "When the reliability of a witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within th[e] general rule of [*Brady*]." [*United States v. Giglio*, supra, 405 U.S. at 154. See *United States v. Bagley*, 473 U.S. 667, 676 (1985)]. And, "[i]mpeaching evidence, [ ] as well as exculpatory evidence, falls within the *Brady* rule." [*Meros*, supra, at 1308, quoting *Bagley*, supra, 473 U.S. at 676]

In order to establish a *Brady* violation a defendant must prove:

"(1) [T]hat the Government possessed evidence favorable to the defendant (including impeaching evidence), [*Bagley*, supra]; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence [see *United States v. Valera*, 845 F.2d 923,

[6] Pertinent part attached hereto and incorporated herein by reference as Exhibit E.

927-28 (11th Cir. 1988)]; (3) that the prosecution suppressed the favorable evidence [see *United States v. Burroughs*, 830 F.2d 1574, 1577 (11th Cir. 1987)], and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different [see *Bagley*, supra, 473 U.S. at 682]." [See *Meros*, supra, at 1309].

FOUR PART INQUIRY

(1) The first part of the four part inquiry refers to the knowledge on the part of the Government of the withheld evidence.

Lynn Lowe's Immunity Agreement was executed in 1987 with the United States Attorney's Office for the Southern District of West Virginia. [See Exhibit D]

The United States Attorney's Office for the Southern District of Georgia was not involved in the agreement reached between the United States Attorney's Office in West Virginia and Lynn Lowe (who used the name of Lynn Campbell for the agreement) [see Exhibit D]. In fact, the United States Attorney's Office for the Southern District of Georgia was not involved in Yamamoto's investigation until D.E.A. Special Agent Douglas L. Driver (S/A Driver), the agent that initiated the investigation into the alleged drug trafficking activities of Junji Yamamoto, was transferred from DEA's Office in Denver, Colorado, to Savannah's DEA Office, in mid 1990[7].

[7] Pertinent part of Castro trial transcripts attached hereto and incorporated herein as Exhibit F.

But, "the prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed for these purposes to the Government." [*Giglio*, supra, 405 U.S. at 154. See *United States v. Butler*, 567 F.2d 885, 889 (9th Cir. 1978)]

Hence, even if the Assistant United States Attorney that prosecuted Castro had no personal knowledge of the existence of the Immunity Agreement, the knowledge of its existence can be *attributed* to him. With minimal diligence of his part, he could have found out about Lynn Lowe's Immunity Agreement.

Furthermore, the United States Attorney's Office for the Southern District of West Virginia, and Assistant United States Attorney Joseph Savage, Jr., were involved in the negociations and Pre-charge Agreement entered by Michael Lowe[8] (Lynn Lowe's husband at the time of the investigation that ended in the indictment and prosecution of Castro), and the Immunity Agreement entered by Lynn Lowe.

Moreover, S/A Driver, who investigated the case against the defendants throughout the period of two and a half years that the investigation lasted, was in telephonic contact with Assistant United States Attorney Nancy Hill (whom replaced Joseph Savage, Jr.), as she stated to the Sentencing Court, in the Southern District of West Virginia, that sentenced Michael Lowe on November 21, 1989[9].

[8] Attached hereto and incorporated herein by reference as Exhibit G.

[9] Pertinent part of Michael Lowe's Sentencing Hearing attached hereto and incorporated herein by reference as Exhibit H.

It is also possible that S/A Driver, a member of Castro's prosecuting team, had knowledge, through his communications with Assistant United States Attorney Hill, of Lynn Lowe's Immunity Agreement.

In any event, the Government cannot dispute that it had knowledge of the existence of Lynn Lowe's Immunity Agreement.

(2) Castro and his counsel didn't learn about the existence of the Immunity Agreement until it was produced at the trial of co-defendant Junji Yamamoto, in March of 1993, almost a year after Castro's trial.

Castro could not, nor his counsel, obtain the agreement with any diligence. First, the Government concealed from the defense the fact that Lynn Lowe was involved in drug trafficking (which on it's own is a separate *Brady* violation), hence, the defense had no reason to suspect that there was an agreement between the Government and Lynn Lowe. Second, the agreement between the Government and Lynn Lowe, and possibly the investigation of Lynn Lowe's criminal activities, were under the alias of Lynn Campbell (or Lynn Woosley), which would have made very difficult to locate the withheld information, even if the defense had had knowledge of Lynn Lowe's criminal activities.

Thus, even with a reasonable amount of diligence, it would have been impossible for the defense to obtain the necessary information leading to the agreement without the help of the Government.

(3) As discussed above, knowledge of the existence of the Immunity Agreement can be attributed to the prosecuting team, and the agreement's existence was not disclosed

until after Castro's conviction. It follows that the Government suppressed the information about the existence of the Immunity Agreement.

(4) In ascertaining whether the withholding of impeaching evidence was material, we must review the record to find out how much did the testimony of Lynn Lowe influenced the jury on it's decision.

Lynn Lowe was one of four witnesses that testified against Castro at his trial. Two of the other witnesses, Savannah's Task Force Officer Irvin Ray (TFO Ray), and D.E.A. Special Agent Paul Boulad (S/A Boulad) testified about statements allegedly made by Castro after his arrest. They told the jury that Castro had told them that he had gone to Minneapolis, on August 11, 1990, on behalf of Junji Yamamoto, and to meet a female for the purpose of negociating a sale of cocaine, because the female was interested in purchasing a large amount of drugs[11].

The other witness to testify against Castro was Special Agent John Boulger, of the Minnesota Bureau of Criminal Apprehensions. He testified that he had observed the meeting between Castro and Lynn Lowe, that took place at the Minneapolis/Saint Paul Airport[12].

Two pieces of evidence were introduced by the Government. One was a telephone/address directory, that

---

[11] Pertinent parts of Castro's trial transcript attached hereto and incorporated herein by reference as Exhibits J (testimony by TFO Ray) and K (testimony by S/A Boulad), respectively.

[12] Pertinent part of Castro's trial testimony attached hereto and incorporated herein by reference as Exhibit L.

included Junji Yamamoto's name and telephone number. The other was a business card of Junji Yamamoto.

The government also introduced testimony by S/A Driver, with regard to two telephone conversation he had with Yamamoto in late March, 1991. The first one was recorded, and in it Yamamoto concedes that an individual from his San Francisco branch office met with Lynn Lowe. Yamamoto also stated that it "could be possible" to obtain a sample of what could be inferred to be cocaine from the individual that met Lynn Lowe, but that he would have to check first.

S/A Driver also testified that on March 27, 1991, Yamamoto called him to tell him that he (Yamamoto) would put S/A Driver in touch with his Los Angeles representative, instead of his San Francisco representative (telephone conversation not recorded)[13].

Lynn Lowe testified that on August 11, 1990, Yamamoto contacted her to tell her that a friend of his would call her. That later the same day Castro contacted her, and arrangements were made for her to meet him at the Minneapolis/St. Paul Airport later the same day. She further testified that at the meeting with Castro, he told her that he could supply any amount of cocaine that their (the Lowe's) customer needed. She testified that Castro told her that the price of one kilogram of good quality

[13] Pertinent part of Castro's trial transcripts attached hereto and incorporated herein by reference as Exhibit M. Transcript of Castro's trial Government Exhibit "10-A, attached hereto and incorporated herein by reference as Exhibit N.

cocaine would go up from a price previously discussed between Yamamoto and Michael Lowe, to $25,000.00[14].

From all of the above it is obvious that without Lynn Lowe's testimony, about her unrecorded conversation with Castro at the Minneapolis/St. Paul Airport, on August 11, 1990, it would have been unlikely that the jury would have convicted Castro.

Hence, Lynn Lowe's credibility was central to the Government's case against Castro.

The fact that Lynn Lowe had been involved in drug trafficking, and that she had entered into an Immunity Agreement with the Government, would have given a reason for the jury to either doubt, or to have evaluated more carefully Lynn Lowe's testimony.

She was presented to the jury, by the prosecutor, in closing argument, as a cooperating witness that "had no incentive"[15] to testify. The prosecutor said that Lynn Love was testifying simply because she had been subpeonaed. [Exhibit P]

At Yamamoto's trial, after discovery of the agreement, the Government argued that the agreement was not the reason for Lynn Lowe to testify at Yamamoto's trial.

The Government based its argument on part of the second paragraph of the Immunity Agreement, that says:

[14] Pertinent part of Castro's trial transcripts attached hereto and incorporated herein by reference as Exhibit O.

[15] Pertinent part of Castro's trial transcript attached hereto and incorporated herein by reference as Exhibit P.

> "[Lynn Lowe] will act at the request and under the direction of the Office of the United States Attorney for the Southern District of West Virginia and the Federal Bureau of Investigations as a confidential participating informant for the purpose of the investigation of various narcotics related crimes in the Southern District of West Virginia and elsewhere. [Lynn Lowe] will act in the capacity of a confidential participating informant in the manner previously described for a period of time not to exceed one (1) year, from the date of execution of this agreement." [Exhibit D]

Lynn Lowe's Immunity Agreement was executed on November 16, 1987.

There is no evidence, up to this date, to the effect that Lynn Lowe fulfilled her part of the agreement with the Government, and that for the period of time between November 16, 1987 to November 15, 1988, she acted in the capacity of a participating confidential informant.

Furthermore, her agreement, as claimed by the Government at Yamamoto's trial, was restricted to investigating the drug trafficking activities of her co-conspirators in the activities that resulted in Lynn Lowe's agreement, namely, the transportation of about 60 ounces of cocaine from Florida to Logan County, West Virginia, on behalf of Michael Lowe.

But, in his Grand Jury testimony, in the Southern District of Georgia, on July 30 1991[16], Michael Lowe

[16] Pertinent part attached hereto and incorporated herein by reference as Exhibit Q

testified that the cocaine that he was obtaining from Florida, was supplied by Yamamoto. This would make Yamamoto one of Lynn Lowe's co-conspirators, and his investigation would be part of the agreement, together with the investigation of anybody connected to Yamamoto's alleged drug trafficking activities.

But even if Lynn Lowe did not participate in the investigation of Yamamoto pursuant to the Immunity Agreement, this didn't relief her from her duties, as stated in the last part of the second paragraph of the Immunity Agreement, and that states:

> "[Lynn Lowe] responsability to participate as a witness in prosecutions in which she may be involved pursuant this agreement shall continue until such time as the prosecutions are completed." [Exhibit D]

Lynn Lowe had a responsability to testify at *any* prosecution that came from the investigation related to her own drug trafficking activities. Not just the cases where she participated as a confidential participating informant.

Without a doubt, Lowe was testifying at Castro's trial pursuant her agreement with the Government, and the jury had a right to know this fact.

The knowledge of the existence of the incentive for Lynn Lowe to testify would have put the jury on notice that Lynn Lowe may have also had a motive to commit perjury, in her attempt to please the federal authorities.

Assuming, arguendo, that the agreement did not play a part in Lynn Lowe's testimony at Castro trial, the fact that the jury was not made aware of Lynn Lowe's drug

related activities and of the Immunity Agreement, casts a doubt on the result of Castro's trial. It may have made a difference if the jury had been aware of Lynn Lowe's past and her agreement with the Government. The withheld evidence would have been the only impeaching evidence available to the defense. Used skillfully, it would have, at a minimun, undermined the credibility of the witness in the eyes of the jury.

On the other hand, the withheld information could be only the "tip of the iceberg". [See *United States v. Griggs,* 713 F.2d 672, 674 (11th Cir. 1983)]

It should have been left for the jury to decide if Lynn Lowe was testifying pursuant to her agreement with the Government or not. They never had a chance to consider this evidence, because the Government withheld it from the defense.

The evidence of Lynn Lowe's Immunity Agreement was material to Castro's guilt or innocence, because it was material to the credibility of Lynn Lowe, who's testimony alone was responsible for Castro's conviction.

II. THE GIGLIO VIOLATIONS.

It is well established that:

> "The constitutional requirement of due process is not satisfied where a conviction is obtained by the presentation of testimony known to the prosecuting authorities to be perjured." [*Alcorta v. Texas,* 355 U.S. 28 (1957)]

And,

> "[t]he due process principal that [the Government] may not knowingly use false testimony to obtain a tainted conviction does not cease to apply merely because the false testimony goes only to the credibility of the witness." [*Napue v. United States,* 360 U.S. 264, 269 (1959)]

PERJURY BY GOVERNMENT WITNESS LYNN LOWE

(1) At Castro's trial, during cross examination of the Government's witness Lynn Lowe by Castro's counsel[17], the following exchange took place:

> "Q: . . . . Have you ever been involved in drugs?.
>
> A: No, just my knowledge with Michael [Lowe]."
>
> [Exhibit R]

During cross examination of the same witness, at Yamamoto's trial, Lynn Lowe conceded that she had been involved in the transportation of about 60 ounces of cocaine, from Florida to Logan County, West Virginia[18].

At Castro's trial the Government made no attempts to correct the false testimony of the Government witness, when in fact, the Government, if not the prosecutor personally, knew that the witness was committing perjury.

---

[17] Pertinent part of Castro's trial transcripts attached hereto and incorporated herein by reference as Exhibit R.

[18] Pertinent part of Yamamoto's trial transcripts attached hereto and incorporated herein by reference as Exhibit S.

(2) At Castro's trial, during direct examination of Lynn Lowe[19] the following exchange took place:

> "Q: And you also knew at this point that the assistance you were providing to DEA would also be considered as benefit that was being provided by Mike [Lowe] as well?.
>
> A: Yes, sir. *That was the reason for doing it at the time.*
>
> Q: What is your current relation with Mike Lowe?.
>
> A: We are still married but separated. I am filing for divorce."
>
> [Exhibit T]

From the above exchange, the prosecutor stated in his closing argument[20]:

> "[Lynn Lowe] is not a cooperating defendant but a cooperating witness who is attempting to help her husband whose [sic] in trouble. There's no, there's no surprise there. There's nothing hidden there. That's what she was doing. Now the difference is that at the time that she was doing these things, that was true. Mike Lowe has been in jail since 1989. They've been separated since that time. She told you she hadn't gotten around to doing it yet, but she is filing a divorce from this guy and that's it. There's no further relationship with [sic] them. . . . So Lynn Lowe no longer has this incentive that they are going to

[19][20] Pertinent part of Castro's trial transcripts attached hereto and incorporated herein by reference as Exhibits T and U respectively.

> argue to you. She came here now as a subpoenaed witness and testified about what happened." [Exhibit U]

At Yamamoto's trial, Lynn Lowe conceded that in 1987 she had entered into an Immunity agreement with the United States Attorney's Office for the Southern District of West Virginia [see Exhibit E], whereby she agreed to:

> "[Lynn Lowe] will act at the request and under the direction of the Office of the United States Attorney for the Southern District of West Virginia and the Federal Bureau of Investigations as a confidential participating informant for the purpose of the investigation of various narcotic related crimes in the Southern District of West Virginia and elsewhere. [Lynn Lowe] will act in the capacity of a confidential participating informant in the manner previously described for a period of time not to exceed one (1) year, from the date of the execution of this agreement. [Lynn Lowe's] responsability to participate as a witness in prosecutions in which she may be involved pursuant this agreement shall continue until such time as the prosecutions are completed." [Exhibit D]

The Immunity Agreement was signed on November 16, 1987, in exchange for a promise not to prosecute Lynn Lowe (who used the name of Lynn Campbell) in relation to her transportation of about 60 ounces of cocaine from Florida to Logan County, West Virginia. [See Exhibit S]

Based on all of the above, it is clear that Lynn Lowe testified at Castro's trial pursuant to her Immunity Agreement. This agreement encompassed the trial in the instant matter, since Castro's investigation is tied to the

Yamamoto investigation. According to Grand Jury testimony of Michael Lowe, it was Yamamoto who allegedly supplied the 60 ounces of cocaine that Lynn Lowe transported from Florida to West Virginia. [See Exhibit Q]

Hence, Lynn Lowe committed perjury during Castro's trial, when she stated that she was testifying under no pressure from the Government.

The prosecutor, as a member of the Untied States Attorney's Office, knew or should have known about the Immunity Agreement Lynn Lowe had signed.

And with this knowledge, he subornated Lynn Lowe's perjury by telling the jury, in closing argument, that Lynn Lowe was testifying without incentives. [See Exhibit U].

PERJURY BY T.F.O. IRVIN RAY.

(3) At Castro's trial, the following exchange took place at the cross examination by Castro's counsel of Savannah's Task Force Officer Irvin Ray[21], who participated in Castro's arrest on August 5, 1991:

"Q: Yes, I mean, give us a description of how you arrested [Castro] please?

A: Yes, sir. Myself and another agent walked down the stairs; went over there; and he drove up, we advised him that we needed to talk to him. And walked him upstairs, and we advised him at the time that he was

[21] Pertinent part of Castro's trial transcript attached hereto and incorporated herein as Exhibit V.

under arrest, that we had an arrest warrant for him from the Southern District of Georgia.

Q: Did you show any gun at the time?

A: No, sir.

Q: You did not point a gun?

A: No, sir.

Q: Did any other agent point a gun at him?

A: No, sir, myself and one other agent went down there, the other one was standing at the top of the balcony."

[Exhibit V]

D.E.A. Special Agent Paul Boulad testified at Castro's trial[22]. He was another of the agents present at Castro's arrest, and he stated with regard to the same incident the following:

"Q: Did anybody point a weapon at [Castro] at the time he was arrested?

A: There is a possibility that a weapon had been pointed at him; yes sir."

[Exhibit W]

Castro was surprised by TFO Ray's perjurious statement and so was his attorney, who inquired repeatedly, as reflected by the record [Exhibit V], to make sure that TFO

[22] Pertinent part of the trial testimony of S/A Boulad attached hereto and incorporated herein as Exhibit W.

Ray's statement was not due to a misunderstanding. Castro and his attorney had no evidence available at the time to present to the jury to rebut TFO Ray's falsity, because of the unexpected of the statement, short of having Castro take the stand to verbally contradict TFO Ray's falsity.

After trial, and armed with the knowledge of TFO Ray's perjured testimony, Castro came across an eyewitness to his arrest. Castro obtained a sworn declaration from this witness, which is attached to this motion, including Castro's own sworn declaration as to the events of arrest[23].

This declaration supports Castro's position that TFO Ray committed perjury in his trial, when Ray testified that neither him, nor any member of the arresting team had drawn weapons at Castro during his arrest, when in fact at least two of them did point guns at him, prior and during his arrest.

DISCUSSION.

As stated above, Castro must prove that (1) the prosecution's case included perjured testimony, (2) the prosecution knew or should have known of the perjury, and (3) there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. [See *United States v. Agurs,* supra, 472 U.S. at 103]

[23] Declarations by Deborah J Powers and Castro attached hereto and incorporated herein as Exhibits X and Y respectively.

The Supreme Court, in its decision in *Bagley,* supra, stated:

> "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." [Agurs, supra, 427 U.S. at 103]
>
> "Although this rule is stated in terms that treats the knowing use of perjured testimony as error subject to the harmless error review, it may as easily be stated as a materiality standard under which *the fact testimony is perjured is considered material* unless failure to disclosed it would be harmless beyond a reasonable doubt."
>
> [Bagley, supra, 473 U.S. at 479-80]

(1) THE PERJURY.

There is no doubt that Lynn Lowe committed perjury. She answered falsely when asked if she had ever been involved in drug trafficking, and again she answered falsely when asked by the prosecutor about her reason for testifying. On this last issue, as discussed above, Lynn Lowe was testifying pursuant to the Immunity Agreement she entered in November 16, 1987, with the United States Attorney's Office for the Southern District of West Virginia. This agreement states that Lynn Lowe's "responsability to participate as a witness in prosecutions in which she may be involved pursuant [the] agreement shall continue until such time as the prosecutions are completed." [See Exhibit D].

As stated above, Lynn Lowe was to participate actively in the investigation of his co-conspirators in the drug trafficking activities that were the reason for her to enter into the Immunity Agreement with the Government, and Yamamoto was, as discussed above, one of such co-conspirators. Hence, Lynn Lowe was bound by her agreement to testify against Yamamoto and any of his alleged co-conspirators.

Even though Lynn Lowe and the Government denied it, is clear that Lynn Lowe acted as a participating confidential informant in this case, pursuant her Immunity Agreement, when she actively got involved in the investigation of Yamamoto's alleged drug trafficking activities.

There were circumstances that would have forced her to cooperate pursuant the agreement, i.e., that she hadn't fulfilled her side of the agreement by participating in the investigations related to her drug trafficking activities during the time period required by the agreement.

The cooperative agreement that Michael Lowe entered with the Government in 1987 (Exhibit G), was similar to Lynn Lowe's Immunity Agreement. The only difference was that rather than having been given immunity for his participation in the offenses that were the reason for the agreement, the Government had the option to indict Michael Lowe, if at the end of the one year period from the execution of the agreement, he had not produced.

Although it was never stated by the Government, Michael Lowe did not produce. Michael Lowe was not indicted at the end of the one year period. His indictment was postponed once he started working with S/A Driver, in January of 1989.

It must be remembered that Lynn Lowe went with Michael Lowe to Jamaica in 1988[24], and met with Junji Yamamoto. At this point she was clearly participating in the investigation of Yamamoto.

Michael Lowe's help was deemed not to be productive. The United States Attorney's Office for the Southern District of West Virginia decided in April of 1989 to indict Michael Lowe[25], and subsequently he entered into a new agreement with the Government[26], this time in exchange for a recommendation of leniency from the United States Attorney's Office.

It is obvious that Michael Lowe participated in the investigation of Yamamoto, until a new agreement was reached, under the terms of his original agreement. This was well past the one year period contemplated by the original agreement.

As discussed above, the two agreements, Lynn Lowe's and Michael Lowe's were negotiated by the same Assistant United States Attorney.

With regards to TFO Ray's perjury, logic and the declarations of the eyewitness and Castro are enough to prove that he made a concious decision to lie at Castro's trial.

---

[24] Pertinent part of Castro's trial transcripts attached hereto and incorporated herein by reference as Exhibit AA.

[25] Attached hereto and incorporated herein by reference as Exhibit BB.

[26] Attached hereto and incorporated herein by reference as Exhibit CC.

(2) GOVERNMENT'S KNOWLEDGE OF THE PERJURY.

Lynn Lowe's drug trafficking activities was known to U.S. Attorney's Office in West Virginia, hence that knowledge can be attributed to the Government. Therefore, the neglect by the Assistant U.S. Attorney that prosecuted Castro to obtain this readily available information, is no excuse, and the knowledge of Lynn Lowe's criminal activities would be attributed to him. [See Giglio, supra, 405 U.S. at 154]

With regard to Lynn Lowe's perjury in relation to her Immunity Agreement, the prosecutor, as stated above, should have known about the agreement. Even if he neglected to properly research the background of the Government witness, this would not exonarate him from the responsability to disclose the false testimony when it was offered.

Therefore, he should have known that Lynn Lowe was committing perjury.

Further, he benefited from this perjury, as he referred to Lowe's lack of incentive, in his closing argument. [Exhibit U]

Because Ray was a member of the prosecuting team, the prosecution can be attributed with the knowledge of his perjury.

> "Since . . . investigative officers are part of the prosecution, the taint in the trial is no less if they, rather than the prosecutor were guilty of nondisclosure. [ ] Knowledge by police or investigators [of the perjury] is therefore imputed to the prosecution under *Brady*."

> [United States v. Buchanan, 891 F.2d 1436, 1442 (10th Cir. 1989) citation omitted]

Obviously TFO Ray knew he was commiting perjury.

Therefore, the prosecution had knowledge of the three instances brought by Castro, where the prosecution's witnesses committed perjury either on direct or cross examination.

(3) MATERIALITY.

The final requirement for the defendant to obtain a new trial is that the perjury must be material.

> 'Evidence is material for the purpose of *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

[*Jacobs v. Singletary*, 925 F.2d 1282, 1289 (11th Cir. 1992)]

It is well established that,

> "when 'the prosecutor's failure to correct a witness' false testimony will warrant a reversal. When [ ] the "estimate of the truthfulness and reliability of the given witness may well be determinative of guilt or innocence." [*United States v. Rivera Pedin*, 861 F.2d 1522, 1530 (11th Cir. 1989) citations omitted]

Furthermore,

> "[a] jury may very well give great weight to a precise reason to doubt credibility, when a

witness has been shown to be the kind of person who might perjure [it]self."

[*United States v. Sanfilippeo*, 564 F.2d 176, 178 (5th Cir. 1977)]

As noted above, Lynn Lowe's testimony was responsible for Castro's conviction. Without her testimony (and information), the Government would not have been able to present a case to the Grand Jury, let alone to go to trial.

Had the jury been aware of Lynn Lowe's perjury, her credibility, on which the Government's case was based, would have been destroyed.

Further, the prosecutor received a rainfall from Lynn Lowel's perjury as he was able to argue the lack of "incentive" for his witness to testify. [See Exhibit U]

In relation to TFO Ray's perjury and as stated in *United States v. Espinosa – Hernandez*, 918 F.2d 911, 914 (11th Cir. 1990),

'Discovery into the investigation might show that [the officer] has committed perjury [ ]. If so, *the discovered evidence would be beyond mere impeaching and a new trial would be necessary* to "remove the taint" from [defendant's] conviction.'

CONCLUSION.

Mr. Castro has presented numerous instances to this Court on which he bases his Motion for New Trial. It is submitted that any of them, standing alone, would be enough to support a new trial. Taken together they present a compelling case, that demonstrates that Mr. Castro is entitled to a new trial.

The crux of Castro's claim is that the Government used perjured testimony and breached it's "duty of full disclosure with respect to requested discovery materials. The end result of this is a conviction that is tainted by the Government's breach of it's duties and by it's subornation of perjury.

Mr. Castro has been denied his right to due process of law. The only avenue open to Mr. Castro, in light of this newly discovered evidence, is to request this Court to grant a new trial pursuant Federal Rules of Criminal Procedures, Rule 33. It is respectfully requested that this Court grant the Motion for New Trial based on the foregoing.

In San Pedro, California, this 5th day of the month of July, 1994.

/s/ Hernan O'Ryan Castro
IN PRO SE

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CR 491-142
HERNAN O'RYAN CASTRO,	)	
Defendant.	)	

EXHIBITS

MOTION FOR NEW TRIAL

PURSUANT RULE 33 F.R.C.P.

EXHIBITS

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EXHIBIT A

[Is reproduced *supra* at pages 3 to 6.]

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA, Plaintiff, vs. JUNJI YAMAMOTO, CARLOS ENRIQUE CHANG aka CARLOS CHANG TSUTSUMI, HERNAN O'RYAN CASTRO aka HERNANDO TAN de CASTRO, BEATRIZ "BETTY" LARA-ARIAS, VICTOR MANUEL CHAVEZ, LARRY LEE TAYLOR, DAVID RHODES and RANDY WARREN, Defendants.	) No. 491-142)))))))))))))))

MOTION FOR DISCLOSURE OF IMPEACHING EVIDENCE AND INCORPORATED MEMORANDUM OF LAW

The Defendant, HERNAN O'RYAN CASRO, represented by his undersigned counsel, moves this Court for the entry of an Order directing the government to make inquiry and disclose, prior to trial, all of the following within its possession, custody or control, or the existence of which is known or by the exercise of due diligence could become known to the government:

1. Any and all records and information revealing felony convictions, guilty verdicts, or juvenile adjudications attributed to each witness called by the government, including but not limited to relevant "rap sheets."

2. Any and all records and information revealing prior misconduct or bad acts attributed to each witness.

3. Any and all consideration or promises of consideration given to or on behalf of the witness. By "consideration," the Defendant refers to absolutely anything of value or use, including but not limited to criminal, civil or tax immunity grants, assistance or favorable treatment or recommendations with respect to any criminal, civil, tax court, court of claims, administrative or other legal dispute with the government or any other parties, payments of money or fees, witness fees and special witness fees, provision of food, clothing, shelter, transportation or other like benefits, placement in a "witness protection program," and anything else which could arguably reveal an interest or bias in the witness in favor of the prosecution or against the defense or act as an inducement to testify or to color testimony.

4. Any and all criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against the witness, any probationary, parole or deferred prosecution status of the witness, and any civil, tax court, court of claims, administrative, or other pending or potential legal disputes or transactions with the government.

5. The existence and identification of each occasion on which the witness has testified before any court, grand jury, or other tribunal in relation to the facts of the case.

6. The existence and identification of each occasion on which each witness who is an informer, accomplice, or expert has testified before any court, grand jury, or other tribunal.

7. Any and all personnel files on any witness and the existence and identity of all government files on any witness.

8. The same records and information requested in Item 1 through 7 above, with respect to each non-witness declarant whose statements are offered in evidence.

9. Any and all other records and/or information which could arguably be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the Plaintiff's evidence or which could arguably lead to such records or information.

MEMORANDUM OF LAW

I.

GENERAL CONSIDERATIONS

Due process requires that the government not suppress evidence favorable to the accused or discrediting to its own case, and upon request, that it disclose to the defense all such information. *Brady v. Maryland*, 373 U.S. 83 (1963). *See also Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942). The requirement of candor by the sovereign encompasses information that bears upon the credibility of its witnesses as well as matters more directly material to guilt or innocence. *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972). As stated by the Supreme Court in *Napue*, 360 U.S. at 269:

> The jury's estimate of truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

* * *

EXHIBIT C

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	
v.	)	CR 491-142
JUNJI YAMAMOTO, ET AL.	)	

GOVERNMENT'S PRELIMINARY STATEMENT RE DISCOVERY

NOW COMES the United States of America, by and through Hinton R. Pierce, United States Attorney, and Terry L. Lloyd, Assistant United States Attorney, for the Southern District of Georgia, to inform the court and parties that the United States will not have a completely "open file" for discovery purposes in this case, but will provide the vast majority of the Government's file to the defense. The Government's position is as follows:

1.

The government will furnish the *Jencks Act* materials not previously disclosed five (5) days prior to trial (on the Wednesday preceding the Monday of trial). The government will accomplish this by giving a copy to A&E Reprographics and Supply Company, 101 E. Liberty Street, Savannah, Georgia 31401, 233-4400. Counsel may purchase a set from A&E. One set will be available in the United States Attorney's Office in Augusta for inspection during regular business hours after 12:00 noon on the Wednesday prior to the week of trial.

* * *

7.

Seven (7) days prior to trial the government will file an extrinsic evidence notice pursuant to Fed. R Evid. 404(b) and *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979).

8.

Also seven (7) days prior to trial the government will file an exculpatory evidence and *Brady-Giglio* notice. Criminal histories of any government witnesses and all considerations extended any government witnesses will be set forth. A copy of any plea agreements with co-defendants who will be testifying against those going to trial will be provided separately in the *Brady* disclosure.

9.

Because of the discovery the government has unilaterally provided herein, the government will oppose all requests for bills of particulars and lists of witnesses. Because of the extensive discovery provided, there can be no legitimate claim of surprise at trial. The indictment is legally sufficient; the essential elements of each offense are set forth in each count. *United States v. Gayle*, 936 F.2d 1234, 1236 (11th Cir. 1991); *United States v. Perkins*, 748 F.2d 1519, 1524-25 (11th Cir. 1984). The indictment is also reasonably circumscribed as to time and place so as to allow it to be pleaded in bar to prevent successive trials. Therefore, there is no bona fide need for a bill of particulars or list of witnesses.

* * *

EXHIBIT D

[LOGO] **U.S. Department of Justice**

United States Attorney
Southern District of West Virginia

November 5, 1987 [Address Omitted in Printing]

S. Benjamin Bryant, Esquire
Schaub & Bryant, L.C.
111 West Virginia Building
Huntington, West Virginia 25701

RE: Lynn Campbell

Dear Mr. Bryant

It is agreed between the United States and your client, Lynn Campbell (hereinafter referred to as Ms. Campbell), as follows:

1. Ms. Campbell will be completely forthright and truthful with federal law enforcement agents regarding all inquiries made of her. In addition, Ms. Campbell will give truthful signed, sworn statements, grand jury testimony and trial testimony relative thereto. Furthermore, she agrees to be named as an unindicted co-conspirator and unindicted aider and abettor as may be deemed appropriate in any counts of any indictments which may be returned by a federal grand jury.

2. Ms. Campbell will act at the request and under the direction of the Office of the United States Attorney for the Southern District of West Virginia and the Federal Bureau of Investigation as a confidential participating informant for the purpose of the investigation of various narcotic related crimes in the Southern District of West Virginia and elsewhere. Ms. Campbell will act in the capacity of a confidential participating informant in the manner previously described for a period of time not to exceed one (1) year, from the date of the execution of this agreement. Ms. Campbell's responsibility to participate as a witness in any prosecutions in which she may be involved pursuant to this agreement shall continue until such time as the prosecutions are completed. At no time will Ms. Campbell take any steps toward furthering that investigation unless she is acting solely pursuant to the request and under the direction of one or more of the agents of the law enforcement agencies referred to above.

3. Nothing contained in any statement or testimony given by Ms. Campbell pursuant to this agreement or any evidence developed therefrom will be used against her directly or indirectly in any criminal proceeding. However, this agreement does not prevent Ms.

Campbell from being prosecuted for any violations of federal and state laws she may have committed should evidence of any such violations be obtained from an independent legitimate source, separate and apart from that information and testimony being provided by Ms. Campbell pursuant to this agreement. In addition, nothing contained in this agreement shall prevent the United States from prosecuting Ms. Campbell for perjury or the giving of a false statement to a federal agent, if such a situation should occur by virtue of her failing to be completely forthright and truthful as required by paragraph 1 above.

4. This written agreement constitutes the entire agreement between the United States and Ms. Campbell.

Very truly yours,

MICHAEL W. CAREY
United States Attorney

By: /s/ Joseph F. Savage, Jr.
JOSEPH F. SAVAGE, JR.
Assistant United States Attorney

JFS:lae

As evidenced by my signature at the bottom of this letter agreement, I have read and understand the provisions of each paragraph herein and, hereby fully approve of each provision.

/s/ Lynn Campbell
LYNN CAMPBELL

11-16-87
Date Signed

/s/ S. Benjamin Bryant — Nov. 16, 1987
S. BENJAMIN BRYANT — Date Signed
Counsel for Lynn Campbell

EXHIBIT E

[75] Q And you're also aware of the fact that you were transporting drugs from the state of Florida up to West Virginia?

A I was not aware –

Q You never –

A – until a certain point that I was.

Q When did you become aware –

A And then I talked to a – I cannot think of the agent's name, but I talked to them and I entered into an agreement with them whereas I told them of the happenings with Mr. Lowe and what part I had involved in it.

Q When was this?

A This was in – I'm sorry – '87, '86-'87.

Q All right. And you entered into an agreement with an agent concerning transportation –

A With the government.

Q – of drugs from Florida.

A Right.

Q And you have previously testified to the grand jury that indicted Mr. Yamamoto you had no involvement with drugs of any nature or description.

A I was – the only questions I have ever been asked was did I use drugs or sell drugs. I was not asked if I went to Miami and brought drugs back.

Q Is that where you went to get drugs and bring them back?

* * *

EXHIBIT F

[173] DOUGLAS DRIVER

GOVERNMENT'S WITNESS, SWORN, TESTIFIES AS FOLLOWS

DIRECT EXAMINATION BY

MR. LLOYD:

Q (Mr. Lloyd) Agent Driver, if you would for the record, state your name.

A My name is Douglas L. Driver, D-r-i-v-e-r.

Q Where are you employed?

A I am a Special Agent with the U.S. Department of Justice, the Drug Enforcement Administration, and I am the agent in charge of the Savannah office.

Q If you would, tell the jurors a little bit about your background as a DEA agent.

A Well, I was hired in 1971. I was a police officer in Washington, D.C. I went through DEA training, and then I went to New York for three years, and then I went from there to Jacksonville, Florida where I stayed for about eleven years, and I transferred to Panama.

While I was in Panama, a fugitive was captured on a big case that I had worked on so I returned to Jacksonville for a lengthy trial. Following that – a trial which lasted almost about a year to a year and a half. I transferred to Denver and then while I was in Denver I was promoted to my supervisory position – current position here in Savannah. So, I transferred here in July of '90. 1990.

* * *

EXHIBIT G

[LOGO] **U.S. Department of Justice**

United States Attorney
Southern District of West Virginia

September 21, 1987 [Address Omitted In Printing]

S. Benjamin Bryant, Esquire
Schaub & Bryant, L.C.
111 West Virginia Building
Huntington, West Virginia 25701

RE: Michael Lowe

Dear Mr. Bryant

This will confirm our conversations with regard to your client, Michael Lowe (hereinafter "Mr. Lowe"). As a result of these conversations, it is agreed by and between the United States and Mr. Lowe as follows:

1. Mr. Lowe will waive his right pursuant to Rule 7 of the Federal Rules of Criminal Procedure to be charged by indictment and will consent to the filing of an information to be filed in the United States District Court for the

Southern District of West Virginia charging such offense or offenses, if any, as the United States considers appropriate. The United States Attorney's Office will consider the nature and extent of Mr. Lowe's cooperation and truthfulness in determining the specific charges to be brought, if any, and Mr. Lowe agrees to plead guilty to those charges. The United States agrees to delay in bringing any charges for a time period of one (1) year from the date of this agreement, during which time Mr. Lowe will act as a cooperating individual with federal law enforcement agencies. This prohibits the United States from prosecuting Mr. Lowe for a period of one (1) year for any crime or probation violation for which any federal agency presently has knowledge as of the date of this agreement noted above. It does not prohibit prosecution of Mr. Lowe at any time for any other offense about which the United States becomes aware through information separate and apart from that information provided pursuant to this agreement.

2. The United States Attorney's Office will also consider Mr. Lowe's request, if made, that he be permitted to enter a guilty plea in a jurisdiction other than the Southern District of West Virginia pursuant to Federal Rule of Criminal Procedure 20. The United States Attorney's Office does not in any way purport at this time to agree to any Rule 20 transfer nor does this agreement purport or give the consent of any other United States Attorney to a Rule 20 motion.

3. Mr. Lowe will be completely forthright and truthful with this office and federal, state and local law enforcement agents with regard to all inquiries made of him. In addition, Mr. Lowe will give signed, sworn statements, grand jury testimony and trial testimony relative thereto,

if the same is deemed necessary. During any interviews conducted pursuant to this agreement, except appearances before the grand jury, Mr. Lowe may have counsel present if he desires. Mr. Lowe agrees to take a polygraph test should same be requested by the United States.

4. Mr. Lowe will act at the request and under the direction of the Office of the United States Attorney for the Southern District of West Virginia and the Federal Bureau of Investigation as a confidential participating informant for the purpose of the investigating crimes in the Southern District of West Virginia and elsewhere. Mr. Lowe will act in the capacity of a confidential participating informant in the manner previously described for a period of at least one (1) year from the date of the execution of this agreement. Mr. Lowe's responsibility to participate as a witness in any prosecutions in which he may be involved pursuant to this agreement shall continue until such time as the prosecutions are completed. At no time will Mr. Lowe take any steps toward furthering that investigation unless he is acting solely pursuant to the request and under the direction of one or more of the agents of the law enforcement agencies referred to above.

5. Nothing contained in any statement or testimony given by Mr. Lowe pursuant to this agreement or any evidence developed therefrom will be used against him in any further criminal prosecutions unless this agreement becomes void due to violation of any of its terms by him. However, this agreement does not prevent Mr. Lowe from being prosecuted for any violations of federal and state laws he may have committed should evidence of any such violations be obtained from an independent, legitimate source, separate and apart from that information and

testimony being provided by him pursuant to this agreement. Nor does this agreement does not prevent the United States from prosecuting Mr. Lowe for perjury or the giving of a false statement to federal agents, if such a situation should occur by virtue of him failing to be fully forthright and truthful as required by paragraph 5.

6. The United States specifically reserves the right to use any information derived from Mr. Lowe, directly or indirectly, as evidence against Mr. Lowe should he refuse to plead guilty to the charges filed pursuant to paragraph 1 or otherwise violates this agreement. This decision shall be within the sole discretion of the United States Attorney's Office.

7. At final disposition, the United States will advise the Court of the nature and extent of Mr. Lowe's forthrightness and truthfulness, or failure to be forthright and truthful, and ask the Court to give same such weight as the Court deems appropriate.

8. There have been no promises or representations whatsoever made to Mr. Lowe by the United States or any of its agents as to what the final disposition in this matter will be. It is understood that the matter of sentencing is within the sole discretion of the Court. However, the United States retains the right at final disposition to address the Court with respect to the nature and seriousness of the offense, to inform the Court of any relevant facts, to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the presentence report and to respond to any statements made to the Court by or on behalf of Mr. Lowe.

9. The United States Attorney's Office will exercise its efforts to place Mr. Lowe and his children in the Federal Witness Protection Program if the circumstances are appropriate for such placement which shall be determined within the sole discretion of the United States Attorney's Office and the United States Marshal Service.

10. If either the United States or Mr. Lowe violates any of the terms of this agreement, the other party will have the right to void this agreement.

11. This written agreement constitutes the entire agreement between Mr. Lowe and the United Stats in this matter. There are no agreements, understandings, or recommendations as to any other pending or future charges against Mr. Lowe in any court other than the United States District Court for the Southern District of West Virginia.

Very truly yours,

MICHAEL W. CAREY
United States Attorney

By: /s/ Wayne A. Rich
WAYNE A. RICH
Chief, Criminal Division

By: /s/ Joseph F. Savage, Jr.
JOSEPH F. SAVAGE, JR.
Assistant United States Attorney

JFS:lae

As evidenced by my signature at the bottom of the four pages of this letter agreement, I have read and

understand the provisions of each paragraph herein and, hereby fully approve of each provision.

/s/ Michael Lowe — /s/ Nov. 16, 1987
MICHAEL LOWE — Date signed
Defendant

/s/ S. Benjamin Bryant — /s/ Nov. 16, 1987
S. BENJAMIN BRYANT — Date signed
Counsel for Defendant

EXHIBIT H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA, v. MICHAEL LOWE, a/k/a JACK KENT CRIST, Defendant.	CRIMINAL NO. 2:89-00056 NOVEMBER 21, 1989 (Filed ___, 1990)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES:

NANCY C. HILL
Assistant U.S. Attorney
Charleston, West Virginia

FOR THE DEFENDANT:

MARY LOU NEWBERGER
Asst. Federal Public Defender
ROBERT P. MARTIN, Attorney
Charleston, West Virginia

COURT REPORTER:

BARBARA A. STEINKE, RPR-CM
500 Quarrier Street, Rm 5414
Charleston, West Virginia 25301
(304) 342-1671

* * *

[17] note from the individual whom he presumes to be the Japanese national to the effect that life is short and the implicit threat that was contained in that very brief message.

My question of you is really two-fold. One is whether those services were designed to be of valuable aid to the United States in investigation of drug smuggling and the like, and whether or not it is the case that Mr. Lowe has voluntarily subjected himself to considerable personal danger in attempting to assist the United States in that regard.

MS. HILL: Your Honor, I had a telephone conversation with the DEA agent. I'm not sure if I talked to Don Fox or Doug Driver. I have talked to both of those, who are DEA agents familiar with this situation in Denver, Colorado, throughout the last nine months. I started talking with him in February 1989, and I've talked with both of them periodically about this since that time. So I can't tell you which one I talked to last week, but I talked to one of them.

Just to give you a little bit of background as to what led up to this last conversation, when I first talked with the DEA agents out there and they told me that Michael Lowe had contacted them and agreed to assist them in investigating a case and had said that he had information about a major drug dealer, this Japanese guy, I told those DEA agents at that time that – and they were asking me or asking what the situation was with the plea agreement we had Michael Lowe under, we had [18] not filed any charges on, so it was a precharge agreement. And I told the DEA agents at that time what my experiences have been with Michael Lowe and what law enforcement officers experiences have been with Michael Lowe with West Virginia, which is they've lost confidence in him. He would come to them when he was facing trouble, say he could do this, say he could make a buy, say he could perform and produce, and it never materialized.

I shared that opinion with these DEA agents in advising that, but at the same time they felt that Michael Lowe had provided them valuable information and that he could work with them in an undercover capacity for some period of time. And I said fine, we will hold off on filing our charges and give you an opportunity to do that. Several months passed. This was in February 1989.

Several months passed and it was in the – I don't have the indictment in front of me, but whenever the indictment was filed in this case, I had had conversations with the DEA agents at that time. Although there had been some undercover contacts, no deals had gone down, nothing had materialized, and so we went forward with our charges here.

As the court is aware, we were set for sentencing here some thirty days ago, whenever it was, and at that time I had been advised by the DEA agents Doug Driver and Don Fox, both of them I was in contact with at that time, that the deal, it was

* * *

EXHIBIT J

[784] A Yes, sir.

Q After he was advised of his rights, did he indicate a willingness to talk to you, to you and the other agent?

A Yes, sir. After Mr. Goulard advised him of his rights, he agreed to cooperate and talk to us, and answer questions we wanted to ask him without an attorney being present.

Q Did he ever indicate in any way that he wanted an attorney prior to talking to you at that point?

A No, sir, he did not.

Q Any hesitancy at all in talking to you?

A No, sir.

Q Was he cooperative with you?

A Very cooperative.

Q If you would, please describe to the jury how the statement was made? What he said at first and what he said afterward?

A After Mr. Castro was advised of his rights by Mr. Goulard, myself and Mr. Goulard started asking him some questions. And we advised him that we had an arrest warrant for him out of the Southern District of Georgia for violation of narcotics laws.

We showed him the arrest warrant; and, we also showed him some pictures that were taken of him while he was in Minneapolis. And I asked him plainly, did he know who this individual was. And he said, "yes, it was me." And it was taken when he was in Minneapolis.

Q What did he say, if anything, about – initially about his [785] reason for going to Minneapolis?

A The reason he stated that he went to Minneapolis upon the request of Jungi Yamamoto. I asked him how did he know Yamamoto, and he continued telling us how he knew Yamamoto. And I asked him how he got in contact with Jungi Yamamoto.

He stated that he had his numbers and everything downstairs in his workshop in his basement.

Q All right, we'll get to that. But what else did he tell you?

A We continued talking, and up there in – we were in his living room. He was sitting on his couch. Roughly, that's around all he stated up there until we walked down to his basement where he had – because I told him I wanted to see the numbers and everything on how he contacted Jungi Yamamoto and all, and he went down to the basement area to his workshop.

Q Is this something he volunteered to do, to give you these numbers?

A Yes, sir.

Q All right. What did he do?

A We walked downstairs and he pulled out the list of numbers and give them to us and stated – showed me which ones was Jungi Yamamoto, and told me how he contacted him and everything.

We continued our conversation about the reason he went to Minneapolis, why Jungi Yamamoto had sent him to Minneapolis. And he stated that Yamamoto had sent him to Minneapolis for the [786] purpose of negotiating a business agreement with a female.

We continued talking. I asked him what kind of business agreement. He stated that it was him and Jungi Yamamoto were in the coffee import/export business. I then looked at Mr. Yam – Castro and told Mr. Castro, "Mr. Castro, I know the reason you went to Minneapolis." He downed his head and then he looked back up and said, "I'm going to tell y'all the truth."

He stated that, "I went to Minnesota or Minneapolis to negotiate the sale of cocaine with this lady because she wanted to purchase large quantities."

Q While down in the basement, did he produce a document for you?

A Yes, sir, he did.

Q I hand you the marked Government Exhibit "4 B", ask you to identify that?

A Yes, sir. This is the document that Mr. Castro gave to myself.

Q Was that the extent of his statement at that time?

A Yes, sir. That was the extent at that time.

Q All right. Backing up now in time to July 26, did you also participate in going with Agent Driver and Defendant Chickelero to Los Angeles?

A Yes, sir, I did.

Q And on July 26, did you participate in the surveillance of

* * *

EXHIBIT K

[774] previous surveillance. He looked at them and he admitted yes, that was him in the photographs. And then he said yes, he admitted that he was at that location.

Q All right. Let me hand you the photograph, a photograph, marked Government Exhibit "4 A" and ask you to look at those.

A These are the photographs, but these are enlarged.

Q All right. The photographs that you showed him were the same photographs just a smaller version?

A That's correct.

Q And you showed him those photographs and he admitted that it was him in the photographs?

A That's correct.

Q And did he indicate that those were pictures of him taken in Minnesota?

A I believe so. We knew where they had been taken, so he –

Q All right. If you would, just continue on just tell the jury what he said.

A Then to the best of my recollection he stated that yes, he was there. He had been sent there on behalf of an individual named Yamamoto. I think Minneapolis did come out evidently, and that he had gone there, and that it was at this Yamamoto's behest that he went.

And we ask him where he had met, Mr. Yamamoto. He said he had met him in prison.

[775] MR. WILLIAMS: Your Honor, I object to that, your Honor.

THE COURT: Well, I will sustain the objection. And the answer is stricken.

The jury is instructed to disregard it. It is not relevant or pertinent to the issues on this question.

Q (Mr. Lloyd) Agent Moulad, did he indicate why he went to –

A Evidently he went and said he was trying to negotiate a cocaine deal.

MR. LLOYD: Those are all the questions I have of this witness, Your Honor.

We will be calling Agent Ray for the continuation of this.

THE COURT: Mr. Williams, I take it.

Mr. Moore, you did not have any more questions? I did think you or Mr. Bennett.

MR. MOORE: No, sir.

THE COURT: Go ahead, Mr. Williams.

CROSS EXAMINATION BY

MR. WILLIAMS:

Q I'm Pomeroy Williams, and I am representing Mr. Castro in this trial.

A Yes, sir.

Q I have a few questions that I would like to ask you. How

* * *

EXHIBIT L

[393] A Yes, sir.

Q Okay. If you would, just basically tell the jury what happened?

A It was about twenty minutes till six that myself began observations of a male that was standing outside the airport terminal on the second level on the southend of the terminal.

I had a camera at that time, and I took some photographs of this person. We watched the person for about twenty minutes, and shortly after six o'clock, that person

went inside the terminal to the Northwestern Airlines counter; stayed there some period of time; went back outside; met a female, and they went inside the terminal to a bar called the Garden Bar in the northeast – the northwest part of the terminal but sat in the northeast section of the bar.

Q And about how long were they together?

A A little over an hour.

Q Did you take some photographs while they were meeting there in the bar?

A I did, yes.

Q I show you what's been marked as Government's Exhibit "4 A". If you would examine those photographs. Do you recognize those?

A I do.

Q And are those photographs that you took on that occasion?

A Yes, sir.

[394] MR. LLOYD: Your Honor, we would tender exhibit "4 A".

THE COURT: All right. I will rule on them at the end of the day. I will take care of all that then.

Q (Mr. Lloyd) Was any type of recording device placed on the woman who was there meeting with that person depicted in the photograph?

A No, sir.

Q Why was that?

A A number of reasons; first, the short notice of the meeting. Second of all, it is the first time the two persons had met, is my understanding, and normally we wouldn't do that on a first meeting between two persons because one may check the other person for a recording device.

And thirdly, we didn't have the equipment to do that.

MR. LLOYD: Those are all the questions I have.

THE COURT: Mr. Williams.

CROSS EXAMINATION BY

MR. WILLIAMS:

Q Officer Boulger?

A Yes, sir.

Q I'm Pomroy Williams, and I represent Mr. Castro. I believe that's his photograph you took.

A Yes, sir, they are.

Q You do see him in this room?

A He's seated behind you, sir, with the mustache and the

* * *

EXHIBIT M

[204] DOUG DRIVER: All right, bye

YAMAMOTO: Bye.

[NOTE: Tape concluded.]

MR. LLOYD: Judge, would you like to remove the transcripts or just put them in the base of their fee because we are going to play two more tapes for this witness.

THE COURT: They have all closed the book. If you want to keep them on your lap or put them on the floor, ladies and gentlemen, whichever is more comfortable, fine.

Q (Mr. Lloyd) Agent Driver, what was your cover? What was your undercover role? You mentioned –

A I told him that I was –

Q You mentioned in the tape it was some kind of business.

A I told him I was a business man, that I was opening restaurants here. And, that we were remodeling some places and – that, you know, I would be opening restaurants was essentially it.

Q What was these phone numbers that you gave him?

A One was for a number in my office that just answered "hello". It is an undercover number. And the other was at my residence.

Q All right. After that conversation with him, what happened next?

A A couple of days later, Yamamoto called me back and told me that he was going to put me in touch with his Los Angeles rep [205] instead of San Francisco rep. He was going to send somebody to me named Carlos, to deal with me.

Q All right. What happened after that?

A He sent two people from Los Angeles to Savannah. They had some phone calls with Lynn Lowe, and they had her come down from Minnesota and meet the two people. One was Carlos Chang Tsusumi, and the other was Albert Chickelero, both from Los Angeles.

They met in Atlanta, and the three of them came to Savannah and met with me. I met them in the lobby of the Hyatt Regency as Riverstreet.

Q Prior to this delivery occurring on April 11th, was there some telephone conversations between you and Carlos Chang and Junji Hamamoto to set this deal up?

A Yes.

Q All right. So what happened on April 11th of 1991? After they came to Savannah?

A When I walked into the Hyatt Regency, I met Lynn Lowe in the lobby, and Carlos Chang was off to the side in a little airline or travel agency.

A few minutes later we were joined by Chickelero. I was meeting Lynn Lowe for the first time. And we had a couple of minutes to talk before Chickelero and Carlos Chang came up and talked to us. And then they wanted to go right up to the room to delivery – they brought one kilogram sample of cocaine

* * *

EXHIBIT N

[200] to Tokyo, and I'm purchasing uh Colombian coffee here.

DOUG DRIVER: Yeah.

YAMAMOTO: And I am negotiating.

DOUG DRIVER: Wow.

YAMAMOTO: But that government control the exporting of coffee here.

DOUG DRIVER: Uh huh.

YAMAMOTO: So it's a little bit difficult to get it.

DOUG DRIVER: Well, Lynn's telling me she met one of your sales reps.

YAMAMOTO: Yeah, yeah, yeah, I know, he's in my office in San Francisco.

DOUG DRIVER: Uh huh.

YAMAMOTO: He's there because he speaks Spanish, you know.

DOUG DRIVER: Oh, okay, well.

YAMAMOTO: And that's my branch office in San Francisco

DOUG DRIVER: Well, is there any chance of the ladies going out there and meeting him, and getting uh a sample of the product line?

YAMAMOTO: Yeah, yeah, it can be possible.

DOUG DRIVER: Uh?

YAMAMOTO: It can be done.

[201] DOUG DRIVER: Okay, what – can you talk to him over the phone and maybe set something up?

YAMAMOTO: Let me check.

DOUG DRIVER: Okay.

YAMAMOTO: By the way, give me your home number

DOUG DRIVER: Okay, the – I'll give you two numbers; okay?

YAMAMOTO: Go ahead.

DOUG DRIVER: All right, 89 both, both of them are 912.

YAMAMOTO: 912.

DOUG DRIVER: Right, 897

YAMAMOTO: 897.

DOUG DRIVER: 9011.

YAMAMOTO: 9011.

DOUG DRIVER: And 236.

YAMAMOTO: 236.

DOUG DRIVER: 8110.

YAMAMOTO: 8110.

DOUG DRIVER: Now, that's – we're doing some construction so there's a lot of different people answering that phone.

YAMAMOTO: I see.

DOUG DRIVER: Okay, but that's where I usually am right now till we get this.

[202] YAMAMOTO: Can I just mention your name, Doug?

DOUG DRIVER: Yeah, oh, yeah.

YAMAMOTO: Okay.

DOUG DRIVER: But, you know, as long as –

YAMAMOTO: How are gonna make a business?

DOUG DRIVER: Well, what I was thinking is that, you know, I would still like to do some high volume kind of stuff with –

YAMAMOTO: Uh, yeah – no, no I don't want to know how you know –

DOUG DRIVER: Well, I was going to send the ladies out.

YAMAMOTO: I want to meet you, I want to meet and talk, you know, and discuss the small details.

DOUG DRIVER: Well, I was going to suggest that Lynn and my wife go out to San Francisco and meet.

YAMAMOTO: Oh, I see.

DOUG DRIVER: And meet your friend out there.

YAMAMOTO: Okay, okay okay, I understand

DOUG DRIVER: And –

YAMAMOTO: No, please wait about three or four days; okay?

DOUG DRIVER: Oh, okay.

YAMAMOTO: My, my friend contact with you.

DOUG DRIVER: All right. Is he going to call me

* * *

EXHIBIT O

[359] Q And, did you assist the investigation by setting up three way phone calls and those type things?

A Yes, sir, I did.

Q All right. Agent Driver has testified of these things so I am not going to go back through them again with you.

All right. Let us move back up to August 11th, 1990. What happened on that date?

A Well, on that day I got a phone call from first Junji Yamamoto stating that a friend of his would be calling. A man called identifying himself as Castro from the Minneapolis airport. And he wanted to meet with Mike. That was his reason for being there was to meet with Mike.

Well, Mike was in the Federal Prison. We could not get a hold of Doug in time to try to work out different arrangements. So Castro changed his ticket reservations and agreed to meet with me at the airport.

Q At the time that Junji Yamamoto called and told you about this meeting, had he ever done such a thing before?

A Well, he had said he was going to send someone but he never had. So it was a surprise when I did get the phone call. There was not really much time to do, you know, a whole lot.

Q So, in previous conversation he had told you that he was going to send somebody to the house?

A Right. Right.

Q But never did?

[360] A Never did.

Q And on this occasion he called you and told you he was sending someone?

A Right.

Q And then you received a call from a person?

A Right.

Q All right. And what did you do after this person called you the first time?

A Well, I called – first I called Doug and I talked to someone else. I do not really know who I talked to. Doug was not in.

Doug then called a little later and he told me just to go on to the airport, and he would call Minneapolis airport security and tell them – Castro had given me a description of what he was wearing and how I could recognize him.

Q When you talked to the person who identified himself on the telephone as Castro, what did he tell you that he wanted to do?

A He had come to talk business with Mike.

Q And what did you tell him about Mike?

A I told him Mike was in the hospital and that he could not, due to the time, that he could not; that the doctors did not want him to travel. It would be a four-hour trip, and it would be useless for him to come to Rochester unless he intended to spend the night. And he agreed to meet me.

Q What, if anything, did you tell him about your customer or [361] your moneyman?

A Well, I told him that Doug, who lived in Savannah, could not be there at the meeting but that Doug had the money, and had he called sooner or had it been arranged quicker, then Doug could have made the meeting also.

Q Did you have several phone calls with Castro during that day?

A I had at least four phone calls. He had given me the phone number for a telephone there at the airport where I could call him. It was just an exchange of phone calls letting him know when I would be there and trying to make sure I had gotten a hold of Doug. And then telling him what time the guy could be at the airport.

Q All right. I believe you said, finally, that Castro agreed to meet with you at the airport?

A Right.

Q What happened then?

A Well, I left. It is a two-hour drive from Rochester to Minneapolis. I got there about, sometime after six. When I got to the airport I was met by one of the agents at the airport who told me where to go and where Castro was.

I walked to where Castro was, and I recognized him because he had his leather jacket with him and a briefcase. And we walked from there to the – I guess you would call it a bar in the airport. We sat down and both ordered coffee. When we [362] first sat down we just mainly talked about ourselves, just kind of little personal things, weather, things like this. Then I proceeded to tell him that Doug had the money for the computers that he was there to talk to us about, and he said that he could supply all that Doug needed.

Q Okay. Ms. Lowe, if you could, try to put things in context so the jury could understand it. What exactly did you tell Castro about Doug?

A Well, that Doug was – that we had no money.

Q "We" being who?

A "We" being Mike and Lynn. Me. We had no money and that Doug was the man with the money who would buy and purchase the computers.

Q Where did that term come from?

A That was the term that Junji used. He either used computers or coffee. In this case, he used computers.

Q And what, if anything, did Castro tell you about his relationship with Junji?

A Well, he told me that he had known Junji for years, that they had – I think they had served time.

Q Did he indicate to you that he had –

MR. WILLIAMS: Your Honor, I object to any reference to "time" or anything.

THE COURT: We will let the record stand, and we will not develop it any further.

[363] MR. WILLIAMS: I just want my objection noted for the record, please.

THE COURT: All right.

Q (Mr. Lloyd) Did he indicate the reason that he came there was because of Junji; or, what did he say in that regard?

A Right, Junji had called him and ask him to come meet with Mike Lowe for the sale of some computers.

Q All right. Outline to the jury what was discussed about the computers.

A Well, the computers – one computer, he just used – the word "computer" was for a kilo of cocaine. During the discussion about the computers or the sale of the computers to Doug, he had told me that the price that had been discussed between Mike and Junji, which I was not a party to that discussion so I, you know, don't know the price that they discussed. But he said that the price would now be 25.

Q All right. So he made reference to a price that Junji had given Mike?

A Right. Right.

Q He said there was a new price?

A The new price would be 25.

Q Okay.

A And he could supply whatever Doug needed or wanted?

Q How did he refer to the quantities that he was talking about? What type of terms did he use?

[364] A Well, he used just – I am losing my train of thought here. One computer was one cocaine, one computer. Or if he went smaller, he used just small sample.

Q Did he give you a price for both going small and going for a –

A He gave me a price for small, but I really would rather not say because I am really not sure. I really do not remember the small price but he did give me a price.

Q All right. So he gave you a price for going small and he also gave you a price –

A Right.

Q – for going a whole one. And that was, what did you say? 25?

A Right.

Q Was there any discussion about the quality of the product?

A Said it was good quality.

Q What else was discussed?

A He said – well, after we finished their discussion on the price, he said that he would call. He checked to verify my phone number and address. And basically that was it. I walked him to his gate and watched him get on his plane.

Q Did he make any comment about meeting Junji shortly after your meeting?

A He did meet with Junji. He met with Junji. In fact, he was suppose to meet with Junji the next day.

[365] Q What did he tell you about that?

A Well, he said he was going to Panama, and that he would be meeting with Junji within the next day or so. He was flying back to San Francisco that night and leaving to meet with Junji.

I ask him if he had been comfortable with me and he said yes, and said he would call, which Junji did call.

Q Did he give you any indication as to whether or not you were going to be able to conduct some business?

A Yes, he said that he would be in touch to conduct business. That he would be calling.

Q Okay. Do you recall how he said it?

A He just said he would call and let me know how or when, or if he would be coming back – I did ask him if he wanted to come back to Minnesota. And he said he would, and I said next time rent a car, because he wanted to come in to meet Mike, so he would have to come into Rochester to do that.

Q I believe you indicated that after you – is there anything else about the conversation that you can recall?

A No, that really basically, I think that is about the whole of the conversation. We just – the biggest part of if at first like I said, was just talking about ourselves or, you know, just getting to know each other, feeling each other out.

Q I believe you stated that after you concluded your discussion you walked him into his terminal to get on his plane?

A Yes, I did.

[366] Q And after that point, what happened?

A I walked back, and was met by the other – one of the other agents and was taken up to their office where I called Doug Driver.

Q And told him what had occurred during the meeting?

A I told him.

Q Ms. Lowe, I know that was a while back when this meeting occurred, but looking around the courtroom do you see the person that you met here in this Court?

A Yes, sir, I do.

Q Would you point him out.

A He is right there.

Q And what is he wearing?

A He is wearing his suit, glasses, tie, white shirt.

MR. LLOYD: Let the record reflect that the witness has identified Hernan Castro.

THE COURT: So ordered.

MR. LLOYD: May I approach, Your Honor?

THE COURT: Yes.

Q (Mr. Lloyd) Now handing you what has been marked as Government Exhibit "4 A" and ask if you would look at that. Can you identify this?

A It's Castro, the man I met in the airport in Minneapolis.

Q And are those photographs of him during the time that you were meeting with him?

[367] A Yes, I as sitting across from him in this top one on this side behind the sign in the restaurant or bar.

Q Do those photographs fairly and accurately portray the events as they occurred that day?

A Yes.

Q All right. That meeting was on August 11th. In September did you have a conversation with Junji Yamamoto?

A Yes, I did. Junji called and wanted me to meet with him and Castro in Mexico, and I refused. I told this that I wouldn't cross the border that he could send Castro here or I would go to San Francisco, but I wouldn't go to Mexico.

Q Did you have other phone calls with Yamamoto in the months that followed that?

A I had many phone calls from Yamamoto. And in September and October they kind of, I guess – all the way through up into the events in March.

Q All right. In the early months of 1991, did you have a discussion with Doug Driver about trying to get something started?

A Yes, we – Junji again started saying that he wanted to get business going. So, we ask him to put us in touch with Castro, and he choose to use someone else.

Q Did you have some conversations with Yamamoto about why he switched from Castro to Carlos?

A He said he didn't trust Castro. That Castro hadn't done [368] what he had sent him there to do.

Q Referencing the meeting with you?

A Right.

Q So Yamamoto indicated that something had not been done that was suppose to have been?

A Right. Something had not been done that was suppose to have been done.

Q And so then in 1991, Yamamoto changed the focus to Carlos Cheng?

A Right.

Q And were you involved in some telephone conversations and discussions that evidently led to the delivery of the one kilo in Atlanta and then to Savannah?

A Right.

MR. LLOYD: Those are all the questions I have, Your Honor.

THE COURT: You gentlemen want to follow the same order?

MR. WILLIAMS: I would like to have a bench conference with Your Honor, please.

[NOTE: Sidebar Conference.]

MR. WILLIAMS: I would like to move for a mistrial, Your Honor, at this time. The Government was admonished to have their witnesses refrained from mentioning any prior convictions or time served in prison, and this witness just blurted this

* * *

EXHIBIT P

[971] Agent Driver was involved in a significant cartel-level trial in Florida in an investigation that he worked on.

He read about it and said, "well, that, that's the kind of agent I want to work with," and went to him. He had a person, Junji Yamamoto, who was, who was a world traveller in drug circles. And he went to Agent Driver and started giving him information. Got introduced to this person. Agent Driver met with him, as you know, on two occasions. They talked about large scale importations of cocaine into our country.

They met in Kingston, Jamaica in March of '89. They met in Costa Rice in December. Beatrice Lara-Arias, a contact of Junji Yamamoto comes in on that meeting, and

they discuss all of her Colombian contacts, how they can procure hundreds and hundreds of kilos of cocaine and bring it into this country.

Mike Low, becomes hospitalized because of his leg, but he also gets sentenced and goes to jail. So his availability is very limited. His wife, Lynn Lowe, as I'm sure the defense will point out, she was acting in hopes of her husband receiving a benefit from her continued cooperation.

She is not a cooperating defendant but she is a cooperating witness who is attempting to help her husband whose in trouble. There's no, there's no surprise there. There's nothing hidden there. That's what she was doing. Now the difference is at the time that she was doing these things, that was true. Mike Lowe has been in jail since 1989. They've been [972] separated since that time. She told you she hadn't gotten around to doing it yet, but she's filing a divorce from this guy and that's it. There's no further relationship with them.

She told you they were going to try to help him; it didn't work out. He didn't get any help out of all this. Apparently, you may infer, his own drug dealings were so bad for the government went to bat for him about didn't help. Frankly, at the point in time when he was sentenced, not a whole lot had occurred; had it? Other than making the introductions, some meetings and that. That's about all that had occurred at the time.

So Lynn Lowe no longer has this incentive that they're going to argue to you. She came here now as a subpoenaed witness and testified about what happened. She testified that she went to Jamaica. She met with Junji Yamamoto. Her husband took her in December of '88.

Many phone calls after he's locked up, she's calling back and forth to Doug Driver.

And then in 1990, on August the 11th, or sometime right in that time frame, she gets a call from Junji Yamamoto and he says, "I'm sending someone to your house to see Mike."

As Agent Driver told you, during his discussions with Junji Yamamoto earlier on, or I think specifically at their meeting in Jamaica, he told them, Yamamoto told Agent Driver and Mike Lowe, "I'm going to send somebody to your house before I

* * *

EXHIBIT Q

Grand Jury 7-30-91 Augusta, Georgia

[64] me he was in California and wanted me to go to Canada and meet him.

Q. Did you do that?

A. No, no. He called regularly, once again, wanting me to meet him in Canada, Tokyo, Hong Kong, Mexico, Jamaica, Panama, Colombia; says he had work for me, he wanted me to work for him, and at the time I was on probation. There was no way that I could do it, had I wanted to, but I did advise the federal authorities that this is what was taking place in Charleston, West Virginia. They were aware of it.

Q. Well, how was it that you learned you were under – the subject of an investigation at Charleston, West Virginia?

A. Well, you see, I was on probation and upon using the drug and being involved with it, I violated my probation, and I just threw my hands up, and I said, "O.K.," I called my probation people, and I said, "Make arrangements for me to go in and talk with somebody at DEA, you know. I screwed up."

Q. Was it discovered on a urine screen? or did they have some information come –

A. Oh, there was a lot of loose talk. There was no definite information, no. Not told to me, anyway, but there was an ongoing investigation.

Q. Well, at the peak period of your distribution of cocaine in the Southern West Virginia area, in the '85 through '87 period –

[65] A. Uh-huh. [Shakes head affirmatively]

Q. – how much cocaine were you distributing, say, in a month?

A. Oh, maybe two, three ounces. It wasn't anything.

Q. And was all of that cocaine you obtained from people who had been contacted by Jimje Yamamoto?

A. Well, that was never, ever discussed insomuch as that. The only thing was said to me was, Yamamoto said, "You did get what you wanted?" and I said, "Yes," and that was – I mean, he just don't talk about it. He won't talk about it on the phone or anything else. You make the arrangements, you talk to him, and you work it out. Then

that's the end of it, until the next time. He is a devious individual.

Q. After Jimje Yamamoto got out of prison, in I believe '86 or '87, did you ever come to meet with him?

A. Yes, sir, I did.

Q. When was that?

A. I called him in Japan and asked him when the next time was he was coming over to the islands, and he gave me a date which was shortly before Christmas of '88.

Q. O.K., now, at this point in time, Christmas '88, you were already trying to cooperate with the federal authorities, is that right?

A. Yes, for anything they asked me for, yes.

Q. And at this point in time, Christmas '88, had you

* * *

EXHIBIT R

[374] Q When were you and Mr. Lowe married?

A 1989.

Q When was the first time you said you went to Jamaica with him?

A '88.

Q Was your first husband still alive then?

A Yes. He did in – no, he wasn't. He died in February of '88. We went in December of '88.

Q But you had been dating since 1985?

A We were divorced.

Q Ms. Lowe, did you know that Mike Lowe was involved with Mr. Yamamoto at the time you started dating him?

A Not at the time I started dating him; no.

Q What was he – was he involved in drugs at that time?

A Not at that time; no.

Q He was not. Have you ever been involved in drugs?

A No, just my knowledge with Michael.

Q You've never been treated for drugs?

A No.

Q How many children does Mr. Lowe have?

A Two.

Q Where are they today?

A I really don't know.

MR. LLOYD: Your Honor, again I raise a relevancy objection.

* * *

EXHIBIT S

[88] further statement, though, that needs some consideration, and that is the report on page 3 we do not have. It is stated that it was from 1984 to the spring of '87 that a total of 60 ounces of cocaine were brought to Logan, West Virginia by Woosley. As far as we can determine, Lowe was (inaudible) to use cocaine," then they talk about how they have been manipulative, but there is nothing in there about any –

THE COURT: Agreement.

MR. HUBBARD: Nothing about any agreement.

THE COURT: Apparently, though, as part of his deal with the government, they were not to prosecute her; is that right?

MR. HUBBARD: That's the interpretation that we believe is correct, along with her brother Joey Campbell.

MR. LLOYD: Your Honor, may I address a question to Ms. Lowe?

THE COURT: Sure.

REDIRECT EXAMINATION

BY MR. LLOYD:

Q Ms. Lowe, the lawyer's already asked you some questions. Just tell us what conversations – who did you talk to and what were you told?

A About the agreement?

THE COURT: First of all, yes, whom did you talk to?

[89] A Okay. The same lawyer –

THE COURT: Woman or man?

A Man, Bryant –

THE COURT: Okay. Benjamin Bryant. He is a lawyer. The lawyer representing your husband?

A Right. At that time. Well, he was at that time. Then he went into the – I believe the U.S. attorney's office. He drew up the agreements. I have an agreement that granted me – it pretty much states pretty much the way Mr. Lowe's stated. I did go to Florida and pick the cocaine up and bring it back. We both entered into the agreements, and there was never a charge against me and I was never prosecuted. I do have an agreement signed by Mr. Bryant.

THE COURT: Did Mr. Bryant have that agreement?

A He should have it.

THE COURT: Where did you see him?

A He gave us a copy. I don't even know if –

THE COURT: Did you sign it?

A Yes. I have one. I mean, it's dated the same day.

THE COURT: Where is it?

A I don't even know if I have mine –

THE COURT: You do not have it.

A – if I could even find it.

THE COURT: But apparently Mr. Bryant has it – that is, the lawyer who was then representing Mr. Lowe.

* * *

[102] brother and the government –

A No. No.

THE COURT: – that is what he has asked you.

A No.

Q So he was never charged, he was never investigated by –

A No.

Q – any agency of any nature or description?

A No.

Q Now, you were involved in transporting 60 ounces. That is almost two kilograms of drugs; is that correct?

A I guess.

Q There's 16 ounces in a pound and 2.2 pounds per kilogram; that would almost be two kilograms. Is that right?

A (No audible response)

Q Now, you had previously testified –

MR. HUBBARD: About her name back then.

Q You previously testified under oath when – you were being questioned about drug involvement, and the question was, "What was he, was he involved in drugs at

that time?" Answer: "No, not at that time." And I believe that would be Mr. Lowe. Question: "He was not. Have you been involved in drugs?" Answer: "No, just my knowledge with Mike."

Now, you do not – under that oath when you said you had no information and you were not involved in drugs except your knowledge with Mike and that Mike was doing all

* * *

EXHIBIT T

[358] Q After that trip, did Mike begin working with Agent Driver?

A Yes.

Q And are you familiar with the fact that Mike was doing this in an attempt to help his own sentence that he was facing in West Virginia?

A Yes, sir.

Q And after Mike got sentenced and was incarcerated, did you also assist Agent Driver in this investigation?

A Yes, I did. I continued taking the phone calls from Junji and relaying these calls to Doug Driver.

Q And you also knew at this point that the assistance you were providing to DEA would also be considered as benefit that was being provided by Mike as well?

A Yes, sir. That was the reason for doing it at the time.

Q What is your current relationship with Mike Lowe?

A We are still married but separated. I am filing for divorce.

Q Mike Lowe was sentenced, I believe, on November 21st, 1989. Is that correct?

A That is correct.

Q In 1990, I am going to lead up to the events of August 11th, 1990. During the months before the August events, did you have telephone conversations with Junji Yamamoto, and Mike Lowe was also involved, and with Doug Driver?

A Right.

* * *

EXHIBIT U

[971] Agent Driver was involved in a significant cartel-level trial in Florida in an investigation that he worked on.

He read about it and said, "well, that, that's the kind of agent I want to work with," and went to him. He had a person, Junji Yamamoto, who was, who was a world traveller in drug circles. And he went ~~to Agent~~ Driver and started giving him information. Got introduced to this person. Agent Driver met with him, as you know, on two occasions. They talked about large scale importations of cocaine into our country.

They met in Kingston, Jamaica in March of '89. They met in Costa Rice in December. Beatrice Lara-Arias, a contact of Junji Yamamoto comes in on that meeting, and they discuss all of her Colombian contacts, how they can procure hundreds and hundreds of kilos of cocaine and bring it into this country.

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* * *

EXHIBIT V

[808] him, please?

A Yes, sir. Myself and another agent walked down the stairs; went over there; and as he drove up, we advised him that we needed to talk to him. And we walked him upstairs, and we advised him at that time that he was under arrest, that we had an arrest warrant for him from the Southern District of Georgia.

Q Did you show any gun at that time?

A No, sir.

Q You did not point a gun?

A No, sir.

Q Did any other agent point a gun at him?

A No, sir, myself and one other agent went down there the other one was standing at the top of the balcony.

Q Were all of you armed?

A Yes, sir. We were armed.

Q What kind of gun do you carry?

A I carry a Smith and Wesson 9mm.

Q 9mm. Did your appearance on the scene frighten Mr. Castro?

A I don't see why it would have. I showed him by credentials.

Q I mean, were you dressed normally at the time? You weren't' in your drug-dealing outfit? I mean, you had on –

A No, sir. I was in normal casual clothes.

* * *

EXHIBIT W

[776] many agents went with you to Mr. Castro's house?

A Several.

Q How many?

A Several.

Q Several. Is that more than two or –

A Oh, more than two, I know, I recall offhand there were, – there was Agent Ray there.

Q Yes, sir.

A Suzanne Hogan.

Q Uh huh.

A There were three agents, and I don't recall their names from our office, also that were present.

Q Were you armed?

A Yes, sir.

Q I mean, was everybody armed? Were all the agents armed?

A Yes, sir. Yes, sir. We are always armed.

Q Were Mr. Castro when he was actually informed he was under arrest? Was he inside the house; or, was he outside the house?

A He – I think we let him come into his residence.

Q Did anybody point a weapon at him at the time he was arrested?

A There is a possibility that a weapon had been pointed at him; yes, sir.

Q Was it a large caliber weapon. Do you carry large caliber weapons?

* * *

EXHIBIT X

DECLARATION

I, DEBORAH J. POWERS, hereby declare the following:

That I am citizen of the United States of America; that I am an employee of the United States Postal Service, in the City and County of San Francisco; that I am a resident of the City of San Pablo.

That on August 5, 1991, at about 3:30 to 4:00 P.M., I was on my way to visit long time friend Haydee Castro, at her residence at 5 SANTA ANA AVENUE, in the city of Daly city.

That when I approached the intersection of St. Francis Avenue and Clarinda St., of the above named city, I saw my friends husband, HERNAN O. CASTRO, driving up to the same intersection, going in the direction of his home.

That I followed him up to the intersection of Clarinada and Castillejo streets where I stopped at a stop sign and waited for Mr. Castro to park his vehicle.

That I saw Mr. Castro start to make a turn into Santa Ana Avenue, from Castillejo, and proceeded to park my car on Castillejo St., across and little to the west of Mr. Castro's residence. While I was parking, and Mr. Castro was turning into Santa Ana Avenue, two men run towards Mr. Castro vehicle, one with a long hair that came from the front door of Mr. Castro's residence, and the second one that was standing next to the side fence of Mr. Castro's residence rear yard. Both of them had weapons in their hands, and were pointing at Mr. Castro.

That I saw Mr. Castro stop his vehicle, and the long hair individual came whitin a few yards of Mr. Castro's vehicle, where he stop and pointed his gun at Mr. Castro, holding it with both hands. The second individual, stopped behind the first one and also pointed his weapon at Mr. Castro from a standing position.

That both individual were thin, in their early thirties and of about six feet tall.

That Mr. Castro exited his vehicle and was pad searched by the long hair individual, and then lead upstairs to the front door of his residence where he was taken inside, together with the two individuals.

I also noticed standing at the front door of Mr. Castro's residence, a third man, older and heavier than the other two men that ran towards Mr. Castro's vehicle, observing all the events that took place in the street.

That after this events I left in my vehicle, which I never properly parked.

That I called Mrs. Castro, who told me that Mr. Castro had been arrested, as I suspected after witnessing the above described events.

I swear under penalty of perjury that all of the above is a true and correct description of the events that I witnessed on the date and location above named.

/s/ Deborah J. Powers
DEBORAH J. POWERS

SAN FRANCISCO, JULY 24, 1993.

[Jurat Omitted In Printing]

EXHIBIT Z

DECLARATION

I, HERNAN O'RYAN CASTRO, hereby declare, under penalty of perjury, to the following events:

On August 5, 1991, between 3:30 and 4:00 P.M., I was approaching my home, located at 5 SANTA ANA AVENUE, DALY CITY, STATE OF CALIFORNIA, when upon starting to make a "U" turn, at the intersection of SANTA ANA AVENUE AND CASTILLEJO STREET, in the vehicle I was driving, two individuals run towards me, one, that was later identified to me as Savannah's Task Force Officer Irvin Ray, came from the front door of my residence, and the other, an unidentified D.E.A.'s Special Agent, that was standing by the rear fence of my home. Both had weapons drawn and were pointing them at me. I was order to stop the vehicle that I was driving in the middle of the interseccion, and to put my hands where they could be seen by the approaching officers.

Officer Ray came to the door of my vehicle, where he told me to leave the vehicle. He opened the door for me, and told me to go with them to the front door of my residence. I didn't see at what point the weapons were put away, but I don't believe they were visible when we arrived at the living room of my residence.

Terminal Island, State of California, on the 29th day of the month of December of 1993.

/s/ Hernan O'Ryan Castro
HERNAN O'RYAN CASTRO

AUTHORIZED BY THE ACT OF JULY 7, 1955 TO ADMINISTER OATHS (18 U.S.C. 4004)

SUBSCRIBED AND SWORN TO BEFORE ME THIS 29 DAY OF DECEMBER 1993 ,
(MONTH AND YEAR)

/s/ [Illegible], Unit Mgr.
SUZAN FELANDO
CORRECTIONAL TREATMENT SPECIALIST

EXHIBIT BB

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
APRIL 4, 1989, GRAND JURY SESSION 88-1
CHARLESTON

UNITED STATES OF AMERICA	Criminal No. 2:89-00056
v.	21 U.S.C. §846 21 U.S.C. §841(a)(1)
MICHAEL LOW, also known as "Jack Kent Crist"	18 U.S.C. §2

INDICTMENT

The Grand Jury Charges:

COUNT ONE

From on or about a date unknown but at least by 1984, until November 16, 1987, in or near Logan and Wyoming Counties, West Virginia and within the Southern District of West Virginia, defendant MICHAEL LOWE, also known as "Jack Kent Crist", did combine, conspire, confederate and agree with others to

knowingly and intentionally possess with intent to distribute cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1); in violation of Title 21, United States Code, Section 846.

COUNT TWO

In or about the fall of 1986, at or near Stollings, Logan County, West Virginia, and within the Southern District of West Virginia, defendant MICHAEL LOWE, also known as "Jack Kent Crist", did knowingly and intentionally, unlawfully and without authority, possess with intent to distribute and cause the possession with intent to distribute cocaine, a Schedule II controlled substance; in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

A True Bill

/s/ Thomas T. [Illegible]
Foreperson

MICHAEL W. CAREY
United States Attorney

By: Nancy C. Hill
Assistant United States Attorney

EXHIBIT CC

[LOGO] **U.S. Department of Justice**

United States Attorney
Southern District of West Virginia

May 8, 1989 [Address Omitted in Printing]

Mary Lou Newberger
Assistant Federal Public Defender
500 Quarrier Street
Charleston, West Virginia 25301

RE: United States v. Michael Lowe
Criminal No. 2:89-00056 (SD WVa)

Dear Ms. Newberger:

This will confirm our conversations with regard to your client, Michael Lowe (hereinafter "Mr. Lowe"). As a result of these conversations, it is agreed by and between the United States and Mr. Lowe as follows:

1. Mr. Lowe is charged in a two-count indictment as follows:

(a) Count One charges Mr. Lowe with a violation of 21 U.S.C. §846 (conspiring to possess with intent to distribute cocaine).

(b) Count Two charges Mr. Lowe with a violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 (unlawful possession with intent to distribute and causing the possession with intent to distribute cocaine).

2. Mr. Lowe will plead guilty to Count Two of said indictment, which charges him with a violation of Title 21,

United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

3. The maximum penalty to which Mr. Lowe will be exposed by virtue of his guilty plea is imprisonment for a period of twenty (20) years and a fine of $250,000, or both, [and a special parole term of at least three (3) years. /s/ MLN] Mr. Lowe will also be subject to a criminal assessment pursuant to Title 18, United States Code, Section 3013. The $50 criminal assessment will be paid in full on the date Mr. Lowe is sentenced.

4. Mr. Lowe will be completely forthright and truthful with this office and federal, state and local law enforcement agents with regard to all inquiries made of him. Mr. Lowe will give signed, sworn statements, grand jury testimony and trial testimony relative thereto, if same are deemed necessary. In any interviews conducted pursuant to this agreement, except appearances before the grand jury, Mr. Lowe may have counsel present if he desires.

5. Nothing contained in any statement or testimony given by Mr. Lowe pursuant to this agreement or any evidence developed therefrom will be used against him in any further criminal prosecutions unless this agreement becomes void due to violation of any of its terms by Mr. Lowe. However, nothing contained in this agreement restricts the use of information obtained by the United States from an independent, legitimate source, separate and apart from that information and testimony being provided by Mr. Lowe pursuant to this agreement. However, this agreement does not prevent Mr. Lowe from being prosecuted for any violations of federal and state laws he may have committed should evidence of any such violations be obtained from any such independent,

legitimate source. In addition, nothing contained in this agreement shall prevent the United States from prosecuting Mr. Lowe for perjury or the giving of a false statement to a federal agent, if such a situation should occur by virtue of Mr. Lowe failing to be fully forthright and truthful pursuant to paragraph 4 herein.

6. There have been no promises or representations whatsoever made to Mr. Lowe by the United States or any of its agents as to what the final disposition in this matter will be. It is understood that the matter of sentencing is within the sole discretion of the Court and the United States will make no recommendation as to specific sentence. However, the United States retains the right to inform the probation office and the Court of any relevant facts, to address the Court with respect to the nature and seriousness of the offense, to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the presentence report and to respond to any statements made to the Court by or on behalf of Mr. Lowe.

7. At final disposition, the United States will advise the Court of the nature and extent of Mr. Lowe's forthrightness and truthfulness, or failure to be forthright and truthful, and ask the Court to give same such weight as the Court deems appropriate.

8. If either the United States or Mr. Lowe violates the terms of this agreement, the other party will have the right to void this agreement. If the Court refuses to accept the terms of this agreement, it shall be void.

9. Following final disposition, the United States will move the Court to dismiss Count One in Criminal No. 2:89-00056 as to Mr. Lowe.

10. This written agreement constitutes the entire agreement between the United States and Mr. Lowe in this matter. There are no agreements, understandings, or recommendations as to any other pending or future charges against Mr. Lowe in any court other than the United States District Court for the Southern District of West Virginia.

Very truly yours,

MICHAEL W. CAREY
United States Attorney

By: /s/ Nancy C. Hill
CHARLES T. MILLER
Assistant United States Attorney

HUNTER P. SMITH, JR.
OCDETF Coordinator

CTM:dch

As evidenced by my signature at the bottom of the four pages of this letter agreement, I have read and understand the provisions of each paragraph herein and, hereby fully approve of each provision.

/s/ Michael Lowe — 8-16-89
MICHAEL LOWE — Date Signed
Defendant

/s/ Mary Lou Newberger — 16 July 1989
MARY LOU NEWBERGER — Date Signed
Counsel for Defendant

EXHIBIT A1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-8688

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY LEE TAYLOR,
RANDY WARREN,
HERNANDO TAN DE CASTRO,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Georgia

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ON PETITION(S) FOR REHEARING

(May 11, 1994)

BEFORE: HATCHETT, Circuit Judge, FAY* and JOHNSON, Senior Circuit Judges.

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Hernando Tan De Castro, is denied.

ENTERED FOR THE COURT

/s/ Joseph W. Hatchett
United States Circuit
Judge

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR 491-142
	)	
HERNAN O'RYAN CASTRO	)	

GOVERNMENT'S RESPONSE TO DEFENDANT CASTRO'S MOTION FOR NEW TRIAL ON GROUNDS OF NEWLY DISCOVERED EVIDENCE

Now comes the United States, by and through Harry D. Dixon, Jr., United States Attorney for the Southern District of Georgia, and makes this response to defendant Castro's motion for new trial on grounds of newly discovered evidence, Rule 33, Fed.R.Crim.P.:

Issues

Castro's motion presents four issues:

I. Newly discovered evidence – that being an immunity agreement between Lynn Lowe, a government witness, and the U.S. Attorneys Office for the Southern District of West Virginia;

II. *Brady/Giglio* violation – that being the failure of the government to disclose to Castro prior to trial the Lowe immunity agreement;

III. Alleged perjury by Lynn Lowe – that being her testimony as to her motives for testifying in the Castro trial; and,

IV. Alleged perjury by a government agent – that being the agent's testimony as to a circumstance of Castro's arrest.

Facts

Castro was indicted in the Southern District of Georgia, CR491-142, for his participation in conspiracies to import and to possess with intent to distribute cocaine, 21 U.S.C. §§ 960, 846, together with Junji Yamamoto, Larry Taylor, Randy Warren, and four others. Castro, Taylor, and Warren were tried before a jury from April 6 to 10, 1992, and all were convicted. Yamamoto was a fugitive at the time.

The testimony at trial showed, with particular respect to Castro, that Yamamoto had been in jail with, and had come to trust Mike Lowe, a drug dealer from Rochester, Minnesota. Yamamoto had asked Lowe to find buyers for the large quantities of drugs he had available. Mike Lowe then had the misfortune of getting caught for drug trafficking in West Virginia in 1987. While awaiting disposition of those charges, Mike and Lynn Lowe travelled to Kingston, Jamaica, where Mike met with Yamamoto. Yamamoto agreed to a business arrangement if Mike Lowe could find a capable buyer. Now casting about for a way to improve his outcome in the West Virginia proceedings, Mike Lowe chanced upon a Reader's Digest chronicle of Drug Enforcement Agency Special Agent Doug Driver's success in bringing a member of the Colombia cocaine cartel to justice in Florida. Mike Lowe called Driver, then assigned to the DEA's Denver office, and offered an "in" to a major international player in the drug scene, that being Junji Yamamoto.

Special Agent Driver initiated an undercover operation, and, using Mike Lowe to make introductions and assurances, met Yamamoto in Jamaica on March 31, 1989. Driver offered to make a major cocaine buy from Yamamoto, but Yamamoto demurred, offering instead a cautious preliminary deal of ten to fifteen kilos to be brought into El Paso from Mexico. Driver refused, but codes were set up and negotiations for an importation deal continued. Mike Lowe travelled out of the country at Driver's direction to meet Yamamoto to advance the cocaine deal.

In November of 1989, Mike Lowe began a five-year jail sentence on the West Virginia case. His sudden absence concerned Yamamoto, who began to suspect Mike Lowe may have been working for the police. Negotiations stalled.

In December of 1989, Driver met Yamamoto in Costa Rica. Price and quantity were agreed to for an early 1990 cocaine delivery. With the gross terms agreed, Yamamoto began repeatedly calling to find and speak to Mike Lowe. Mike's wife Lynn took the calls and at Driver's direction attempted to convince Yamamoto that Mike was in the hospital (rather than jail). By August of 1990, Yamamoto had become sufficiently suspicious of Mike's absence to send someone also involved in the deal, his San Francisco representative, to Mike Lowe's residence. That someone was Castro. Though Yamamoto had sent Castro to meet and negotiate the particulars of the Driver importation deal with Mike Lowe at Lowe's home, Lynn Lowe convinced Castro that Mike Lowe was in the hospital and the four hour round-trip drive from the Minneapolis airport to Rochester would be wasted. Lynn Lowe offered instead to meet Castro at the airport and Castro agreed. Castro told Lynn Lowe that he had known Yamamoto for years, and

that Yamamoto had sent him to talk business with Mike Lowe. Castro "convinced" Lynn Lowe that he could be trusted by telling her that he and Yamamoto had served time together, as had Mike Lowe and Yamamoto. Castro told her that if Driver had the money, Castro could supply all the cocaine he needed. Castro said he was returning to San Francisco after the Minnesota meeting, and would travel thence to Panama to meet with Yamamoto. The meeting between Castro and Lynn Lowe at the airport was observed by government agents conducting surveillance for that purpose.

Yamamoto later called wanting a meeting in Mexico with his San Francisco representative, Driver, and the Lowes, and gave Lynn Lowe Castro's telephone and FAX numbers. Driver refused the meeting because of security concerns.

With the deal stalled by the security concerns of both sides, Driver asked Yamamoto if anything could get done. Yamamoto said he was still interested, and confirmed that Lynn Lowe and his San Francisco representative (Castro) had met. In a conversation days later, Yamamoto told Driver that he would send someone other than his San Francisco representative to meet with Driver in Savannah, because he was displeased with Castro's performance at the Minnesota meeting, and would henceforth use other representatives to deal with Driver. In a tape recorded conversation between Mike Lowe and Yamamoto, Yamamoto says Castro is "out of business."

At and immediately following his arrest, Castro made statements amounting to a confession of his knowledge of parts (though not all) of Yamamoto's design to import and distribute cocaine, specifically confirming that he had

travelled to Minneapolis at Yamamoto's direction to meet a female for the purpcse of negotiating a cocaine sale.

Lynn Lowe, then using the name Campbell, had received a letter grant of testimonial immunity from the U.S. Attorney's Office for the Southern District of West Virginia on November 16, 1987. The grant of immunity extended to the government's use of her own statements against her, but not to prosecutions brought on evidence gathered independently of her statements. Her participation as a witness was to extend to "any prosecutions in which she may be involved pursuant to this agreement." The testimonial immunity was a consequence of the plea agreement between Mike Lowe and West Virginia prosecutors.

At the time of Castro's trial, neither the case agents nor the prosecutor in the Southern District of Georgia was aware of the existence of the testimonial immunity grant to Lynn Campbell (later Lowe) in West Virginia. Yamamoto was arrested in Japan and extradited to this district, where he was tried and convicted on March 10-11, 1993. The prosecutor and agents in the Southern District of Georgia were still unaware of the agreement at the start of the Yamamoto trial. On cross-examination during that trial, Lynn Lowe disclosed the existence of her agreement, indicating it to have collateral to her husband's plea agreement.

Issue I

To obtain a new trial based upon newly discovered evidence, movant must satisfy five criteria: (1) the evidence must be discovered following trial; (2) the movant must show due diligence to discover the evidence; (3) the

evidence must not be merely cumulative or impeaching; (4) the evidence must be material to the issues before the court; and, (5) the evidence must be of such a nature that a new trial would probably produce a new result. *United States v. Hall*, 854 F.2d 1269, 1271 (11th Cir. 1988). "The district court should use 'great caution' in granting a new trial motion based on newly discovered evidence." *United States v. Garcia*, 13 F.2d 1464, 1472 (11th Cir. 1994).

Castro fails to show that the evidence is more than merely impeaching or that a new trial would probably produce a new result. The only use of the prior testimonial immunity grant would have been for impeachment. Its effect for such purpose would have been minimal, given that the immunity grant was only testimonial, that it was a consequence of her husband's plea agreement and not her own, and that Lynn Lowe's testimony was copiously corroborated by surveillance, co-conspirator statements, and Castro's own post-arrest statements.

The post-trial discovery of merely impeaching evidence against a witness whose testimony was strongly corroborated by other evidence and duplicated by the defendant's confession fails to establish grounds for new trial.

Issue II

Castro's allegations of a *Brady/Giglio* violation is more properly cognizable under a motion pursuant to 28 U.S.C. §2255, but in as much as such a motion may be filed at any time, the government has no objection to Castro's motion for new trial being considered as demanding relief under both Rule 33 and 28 U.S.C. §2255.

The government is required to disclose to criminal defendants evidence which is arguably favorable to them, and this includes impeachment evidence such as testimonial immunity agreements. *United States v Bagley*, 473 U.S. 667, 676 (1985). However, to obtain a new trial, a defendant must satisfy each of four tests: (1) that the government possessed evidence favorable to the defendant; (2) that the defendant neither possessed the evidence nor could have obtained it with reasonable diligence; (3) that the prosecution suppressed the evidence; and, (4) that had the evidence been disclosed, there is a reasonable probability that the outcome of the case would have been different. *United States V. Spagnoulo*, 960 F.2d 990, 994 (11th Cir. 1992).

(1) While the government prosecutors and agents in the Southern District of Georgia did not know or have reason to suspect that Lynn Lowe had in 1987 received testimonial immunity in West Virginia, the standard that applies to the first prong of the *Brady* test is one of constructive possession. *Spagnoulo*, *Id.*; *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir.), *cert. denied*, 493 U.S. 932 (1989). Despite local prosecutors' actual ignorance of the existence of the evidence, the possession of the evidence by another government prosecutor's office is sufficient to impute possession under *Brady*.

(2) The government does not contest that Castro did not have nor could have obtained the evidence with reasonable diligence.

(3) The good faith, bad faith, moral culpability, willfulness, or best intentions of the prosecutor are irrelevant in determining whether *Brady* evidence has been "suppressed." *United States v. Agurs*, 427 U.S. 97, 110

(1976); *Spagnoulo, Id.* In this light, "suppression" constitutes no more than having or constructively having the evidence and failing to disclose it. In effect, the third prong of the *Brady* test has become but a reprise of the first. Despite the good faith and best intentions of the prosecutor and agents here, the evidence was "suppressed."

(4) Suppression of favorable evidence results in constitutional error justifying new trial "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678. The evidence at issue here was not material in that sense, and its disclosure to Castro prior to trial would not have given him a reasonable probability of acquittal. *Spagnoulo*, 960 F.2d at 994. The evidence was merely impeaching, and not strongly so at that. The witness' testimony was otherwise corroborated and was cumulative to Castro's own admissions. The Court of Appeals, on review of Castro's conviction on direct appeal, found the evidence supporting his conviction to be "substantial." *United States v. Taylor*, 17 F.2d 333, 339 (11th Cir. 1994). There is no reasonable doubt that had the evidence of Lynn Lowe's 1987 testimonial immunity grant stemming from her husband's indictment been disclosed to Castro, he would have been convicted all the same.

Because Castro fails the fourth and crucial prong of the *Brady/Giglio* test, he has not met the burden compelling a new trial.

Issue III

Castro alleges that Lynn Lowe committed perjury when she testified that her drug involvement in the past was "just my knowledge with Michael [Lowe]," Castro

Motion for New Trial, p. 19, and that her motive for testifying was to benefit her husband in connection with his West Virginia case. Castro Motion for New Trial, p. 20. Both of these statements are, based on the record in both the Castro and Yamamoto trials, true. Her involvement in the drug trade was in the company of Mike Lowe prior to his arrest, and her involvement later was at the direction of the DEA as a collateral part of her husband's plea agreement. There is a real question as to whether her testimonial immunity agreement compelled her to be a witness in the Castro trial, as it was not one of the prosecutions contemplated thereunder, it having arisen not as a consequence of any of Mike Lowe's drug dealings prior to his West Virginia arrest, but of a "sting" engineered by the DEA with Lowe's assistance. This question need not be resolved however, since Lynn Lowe's answers on direct and cross examination truthfully set out her motivations for testifying, which would have been unimpeached by the disclosure of an agreement designed expressly to benefit her husband's appeal interests.

Issue IV

Castro's allegation of perjury on the part of a government agent is grounded on conflicts between the agent's testimony and that of another government witness regarding whether at the time of Castro's arrest any agent had drawn his weapon. This allegation is patently meritless. Not only is the point at issue immaterial, but the jury heard both witnesses and could assess the credibility of each, assuming that they chose to give any weight whatsoever to the insignificant detail of whether agents arresting Castro, long after any event significant to his participation in the conspiracy, had drawn their weapons.

Conclusion

Whether his motion is considered under Rule 33, Fed.R.Crim.P. or treated as though filed pursuant to 28 U.S.C. §2255, on no ground asserted does Castro meet the burden necessary to justify the grant of a new trial. His motion should be denied.

Respectfully submitted,

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IN PRO SE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA, Plaintiff, v HERNAN O'RYAN CASTRO, Defendant.	:	Case No. CR491-142

REPLY TO GOVERNMENT'S RESPONSE TO CASTRO'S MOTION FOR NEW TRIAL PURSUANT TO F.R.Crim.P., RULE 33

Comes now Defendant, HERNAN O'RYAN CASTRO, In Pro Se, and brings this reply to the Government's response to his motion for new trial pursuant Federal Rules of Criminal Procedure, Rule 33, and shows as follows:

Facts

The facts in this case are as presented in Castro's brief in support of his motion for new trial.

Argument

(1) Appropriateness of Castro's motion for new trial

In its response, the government argues that allegations of a *Brady/Giglio* violation are more properly cognizant under a motion pursuant to 28 U.S.C. 2255. Government's response at 7.

Generally, a motion for new trial may be distinguished from a motion to vacate or set aside judgment, which ordinarily can be had only because of circumstances rendering the judgment inequitable. A motion to set aside must be predicated upon some nonamendable defect which appears on the face of the record or pleadings, or upon lack of jurisdiction; where a motion is based upon some extrinsic defect which does not appear on the face of the record or pleadings, the proper means of attack is a motion for a new trial. See American Jurisprudence, Volume 58, New trial, section 7.

It is obvious that Castro filed the proper motion, since the record does not reflect his allegations of *Brady/Giglio* violations.

(2) The withholding of impeaching evidence

In its response to Castro's motion for new trial, the government avoids all together the subject of the non-disclosure of Lynn Lowe's drug trafficking activities.

> "The thrust of *Giglio* and its prodegy has been to ensure that the jury knows the facts that *might* motivate a witness in giving testimony[.]" *Brown v. Wainwright,* 785 F.2d 1457, 1465 (11th Cir. 1986)

Lynn Lowe, as depicted in the government's response, entered into her immunity agreement as "a consequence of the plea agreement between Mike Lowe and West Virginia prosecutors." Government's response at 5.

This is not reflected by the facts. Lynn Lowe and her brother Joey Campbell transported approximately 60 ounces of cocaine (not an insignificant amount) from Florida to Logan County, West Virginia. She entered into the immunity agreement because of that criminal act, and in order to save herself and her brother from being indicted with Michael Lowe.

The government not only failed to disclose the existence of the immunity agreement, but it also failed to disclose the reason for Lynn Lowe to enter into that agreement; her involvement in drug trafficking.

While in its response to Castro's motion for new trial the government concedes that the knowledge of the existence of the immunity agreement can be imputed to the prosecuting team, they are silent with respect to Lynn Lowe's drug trafficking activities. That silence is unimportant. The same reasons that support the imputation of knowledge of the immunity agreement to Castro's prosecuting team, also supports their knowledge of Lynn Lowe's drug trafficking activities. Of course the knowledge of the existence of Lynn Lowe's immunity agreement would make it as good as if Castro's prosecutor had the immunity agreement and the evidence of Lynn Lowe's drug trafficking activities in his file. In its response to Castro's motion the government concedes as much.

The government further concedes that Castro did not have or could have obtained the immunity agreement. No concessions are made with regard to the evidence of Lynn

Lowe's drug trafficking activities, but, as argumented by Castro in his brief in support of his motion for new trial, without the disclosure by the government of this evidence, there was no reason for Castro to suspect that Lynn Lowe had been involved in drug trafficking. She denied as much in front of the Grand Jury; prior to Castro's trial the government informed Castro that they had no materials with regard to Lynn Lowe, in response to Castro's motion for discovery; and Lynn Lowe was asked at Castro's trial about her involvement in drug trafficking, and she answered that she had none. With any amount of reasonable diligence, Castro would have been unable to discover Lynn Lowe's drug trafficking activities.

The government also concedes that they suppressed the immunity agreement. Again, no concessions are made about Lynn Lowe's drug trafficking activities, but, as the government so candidly puts it, this "third prong of the *Brady* test has become but a reprise of the first." Government's response at 8. Therefore, if the government possessed the evidence and Castro never got it, it follows that the government suppressed it[1].

As it respects to the final prong to succeed in obtaining a new trial due to a *Brady* violation, the government claims that the evidence of the immunity agreement was

[1] Even though the good faith or bad faith of the prosecutor is irrelevant in determining whether a *Brady* violation exists, it is important to bring to this Court's attention the fact that as of today, almost a year and a half since Yamamoto's trial, where the existence of the immunity agreement and of Lynn Lowe's drug trafficking activities came to light, the government has made no effort to notify Castro of these obvious *Brady* violations. If it wasn't because of Yamamoto's trial attorneys, Castro would still be in the dark about these violations.

"merely impeaching, and not strongly so at that." Government's response at 8.

> "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the *Brady*] rule." *Giglio v United States,* 405 U.S. 150, 154 (1972)

The government claims that Lynn Lowe's testimony was otherwise corroborated and was cumulative to Castro's own admissions. Government's response at 8-9. Castro's trial defense theory was two fold, as presented by Castro's counsel to the jury at closing argument and through jury instructions.

Castro's first defense was that he never entered into an agreement to import and distribute cocaine, as charged by the Grand Jury. In this respect, the testimony of Lynn Lowe was central to the government's case. The only corroborating evidence is that from Castro's alleged admissions after his arrest. But, in the government's own words, Castro stated that "he travelled to Minneapolis at Yamamoto's direction to meet a female for the purpose of *negotiating* a cocaine sale." Government's response at 5. The government forgets what the Ninth Circuit taught us in *United States v. Melchor-Lopez,* 627 F.2d 886 (9th Cir. 1980), by stating "[h]ere the government proved that each appellant engaged in [negotiations] which might have ended in firm commitments but failed to establish the "meeting of the minds" to consummate an illegal transaction which is essential to conspiracy." Id. at 892. Keeping in mind that Yamamoto was a broker of drugs, as the trial evidence proved, and not a supplier, the fact that Castro allegedly went to Minnesota to negotiate a drug deal at Yamamoto's direction, is not probative of an agreement

between Yamamoto and Castro to commit the offenses charged by the Grand Jury. An agreement to negotiate an agreement is not an agreement to commit a crime as required by conspiracy law. Castro's conviction was based on Lynn Lowe's trial testimony. She gave the jury what they considered sufficient evidence to convict Castro. The rest of the evidence was not probative of the existence of the criminal agreement. Therefore, for Castro's first theory of defense Lynn Lowe's testimony was central.

Castro's second theory of defense was that even if he entered into an agreement with Yamamoto to import and distribute cocaine, this agreement was not the indicted agreement, although its goals were identical, therefore Castro claimed that there was a variance between the indictment and the evidence presented by the government at trial.

For this defense theory, Lynn Lowe provided the only evidence that the jury could have considered in reaching their verdict. Lynn Lowe testified as to Castro's knowledge of Yamamoto's prior negotiations with Mike Lowe; she also testified as to Castro's close relation with Yamamoto, and about Carlos Chang knowing Castro. She also testified that both Castro and later Chang stated that, each individually, could supply any amount of cocaine that the customer wanted.

Without Lynn Lowe's testimony the jury would have been left with very little from where to inferred the existence of single agreement among all of the defendants[2].

The evidence of Lynn Lowe's drug trafficking activities, as well as the immunity agreement she was forced to enter to keep herself and her brother Joey out of prison, or at least from being indicted together with Mike Lowe, would have been the *only* impeaching evidence that Castro would have possessed to undermine the credibility of the witness. As it was, Lynn Lowe's testimony went unchallenged, as if she had never been cross examined by the defense.

Furthermore, the immunity agreement was the reason for Lynn Lowe to testify.

As the Second Circuit said,

> "[A] witness's credibility could very well [be] a factor of central importance to the jury, indeed every bit as important as the factual elements of the criminal case." *United States v. Wallach,* 935 F.2d 445, 455 (2nd Cir. 1991)

(3) The perjured testimony

(a) By Lynn Lowe

In its response to Castro's motion for new trial, the government claims that both, Lynn Lowe's answer to

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[2] It is also important to note that it was Lynn Lowe's testimony that the government, the Probation Officer and this Court relied upon to find Castro responsible for the sixteen kilograms of cocaine distributed by Chang.

defense counsel with regard to her drug involvement and to the prosecutor about her reasons for testifying, were true. Government's response at 9.

The government argues that Lynn Lowe answered truthfully to the question about her involvement with drugs because when she said that all she had was "just [her] knowledge with Michael [Lowe]," she was actually stating that "[h]er involvement in drug trade was in the company of Mike Lowe." Government response at 9. Either the government has a distorted sense of what is true and what is not, or the government has no other response to Castro's allegations. Lynn Lowe deliberately lied to the Court and the jury in order to hide her involvement in drug trafficking, correctly fearing that if she told them about her drug trafficking activities the jury was going to look more closely at her testimony. The question that Castro's counsel asked her was very specific. Her answer was deliberately untruthful.

On the other hand, with respect to the second claim of perjury brought by Castro, in response to the prosecutor's question with regard to her motives for testifying at Castro's trial, Lynn Lowe responded that there was no present motive to compel her to testify. The government argues that the prosecutions in Savannah had no relation to the case in West Virginia, because the Savannah case had been "a sting engineered by DEA with Lowe's assistance." Government's response at 10. However, this is not factual. After the FBI rejected the story that Mike Lowe told them, he went to the DEA with the *same* story; at DEA he found interested ears in Driver. Lowe's story didn't change; Yamamoto, who had played an important role in the supply side of the drugs that resulted in Mike Lowe's investigation and indictment in West Virginia, was

a "worldwide broker of cocaine" and Lowe could purchase large quantities of cocaine through him. This was the story to the FBI in West Virginia; this was the story to Driver in Denver and later in Savannah. The purpose of Lynn Lowe's immunity agreement was for her to participate in the investigations related to the West Virginia case, either in that state or elsewhere, and to testify in the cases coming from those investigations, in exchange for her immunity from prosecution in the West Virginia case. Yamamoto was related to the case in West Virginia, therefore his investigation was covered by Lynn Lowe's immunity agreement. The government alleges that Castro was part of the Yamamoto organization. This would make Castro also a target for Lynn Lowe's immunity agreement, both for investigation and for prosecution. Lynn Lowe testified at Castro's trial pursuant to her immunity agreement.

The government has conceded that the possession of the withheld immunity agreement can be imputed to Castro's prosecuting team and the situation as to Lynn Lowe's drug trafficking activities falls in a similar situation as the immunity agreement, therefore the possession of the evidence of her drug trafficking activities can also be imputed to Castro's prosecuting team. Hence, the knowledge of her immunity agreement and of her drug trafficking activities are imputable to the prosecuting team.

> "The prosecutor presenting the government's case need not be aware that testimony is false in order for due process violation to occur; it is sufficient if *another government attorney* knows about the false testimony and no steps are taken to correct it." *Mills v Scully,* 826 F.2d 1192, 1195 (2nd Cir. 1987)

Lynn Lowe answered untruthfully, the government had knowledge of her untruthfulness and did not attempt to correct the falsity.

> "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the 'rudimentary demands of justice' . . . [t]he same result obtains when the [government], although not soliciting false evidence, allows it to go uncorrected when it appears. . . . This rationale extends to impeaching evidence." *DeMarco v United States,* 928 F.2d 1074, 1076 (11th Cir. 1991)

Furthermore, the government received a rainfall from Lynn Lowe's perjured testimony when the prosecutor argued to the jury in closing argument that Lynn Lowe had come to testify as a subpoenaed witness, and that the only pressure that had existed for her to cooperate with the government during the investigation of the case, that is, to help her incarcerated husband, was no longer a factor since she was filing for divorce from him. In this way the prosecutor boosted the credibility of Lynn Lowe in the eyes of the jury, using her perjured testimony, testimony known to government to be perjured.

> "The government has a duty not to exploit false testimony by a prosecutorial argument affirmatively arguing to the jury the truth of what it knows to be false." *Brown v Wainwright,* 785 F.2d 1457, 1464 (11th Cir. 1986)

Lynn Lowe committed perjury at Castro's trial[3] with the prosecutor's knowledge, who failed to correct the falsity and later argued to the jury what he knew to be false.

As to the materiality of Lynn Lowe's perjury, as stated before, Lynn Lowe's testimony was central, if not the sole support (as to his multiple conspiracy defense theory) to Castro's convictions. Her testimony of the conversation with Castro was uncorroborated as to its content. The best the government had from other sources is that Castro had some connection with Yamamoto, as far as his drug trafficking activities, that Castro had the availability to supply drugs to Driver (or at least a sample), and that Castro had gone to Minneapolis at Yamamoto's request to

[3] It is of relevant importance to mention at this point that as far as Castro knows, Lynn Lowe has given sworn testimony three times in relation to the case at bar. On her first appearance she gave false testimony to the Grand Jury with regards to her drug trafficking activities (at best she consciously mislead the Grand Jury); see Grand Jury transcripts for July 31, 1991, at page 54. On her second sworn testimony she appeared at Castors' trial and again committed perjury. In this regard it must be noted that Castro objected to the P.S.I.'s report description of the events that Lynn Lowe testified to, as not been factual. The third time that Lynn Lowe testified she did it at defendant Yamamoto's trial. Among other instances of perjury, she stated at the March 1993 trial that she had obtained a divorced from her then deceased former husband, Michael Lowe, in May of 1992. Castro has obtained information that Lynn Lowe never obtained a divorce from Michael Lowe. See attached Exhibit 1, from Lynn Lowe's direct examination at Yamamoto's trial; Exhibit 2, a complaint for divorce filed by Irian Lynn Lowe against Michael Lowe at the Kanawha County Circuit Court, in West Virginia, Civil Action No. 92-C-1792, and Exhibit 3, a copy of the docket for the same case as of September 17, 1993. Castro ignores the reason(s) for Lynn Lowe to lie about something of so little importance. But somebody that lies in something so intranscendental can be expected to lie in more important matters.

attempt to negotiate a drug sale to Lynn Lowe, who met him at the Minneapolis/St. Paul airport. Lynn Lowe's testimony provided what the jury considered to be sufficient to convict Castro in the two conspiracy counts. She gave the only evidence the jury could have used to reach the decision that if an agreement existed between Castro and Yamamoto, that was the same agreement that had been indicated under the conspiracy counts.

If the government had stepped forward at the time, and informed the jury that Lynn Lowe had committed perjury, her credibility would have been severely damaged.

> "A jury may very well give great weight to a precise reason to doubt credibility when a witness has been shown to be the kind of person who might perjure [her]self." *United States v Sanfilippo,* 564 F.2d 176, 178 (5th Cir. 1977)

(b) By Irvin Ray

In its response, the government states that this allegation of perjury is "grounded on conflicts between the agent's testimony and that of another government witness," government's response at 10. And that the issue is immaterial because the conflict of the testimonies was heard by the jury and the jury "could asses the credibility of each, assuming that they chose to give any weight whatsoever to the insignificant detail of whether agents arresting Castro, long after any event significant to his participation in the conspiracy, had drawn their weapons." Government's response at 10.

First of all, Castro is not basing this claim of perjury in contradicting trial testimony of the two arresting

officers that testified at Castro's trial. While Irvin Ray testified that he had not drawn his weapon during Castro's arrest, and that nobody else had, Paul Boulad testified that "there is a possibility that a weapon had been pointed at [Castro]; yes, sir."

Castro is saying that both officers lied. Agent Boulad mislead the jury by saying that there was a "possibility" that a weapon had been pointed at Castro, when he in fact had a direct view of Castro's arrest from his position at the top of the balcony of Castro's home, overviewing the area where Castro was arrested, and no more than thirty feet away[4].

It is of no importance what the subject of the perjury was, as claimed by the government. What is material is the fact that agent Ray, *the case agent,* committed perjury. And that also agent Boulad committed perjury, or at a minimum, mislead the jury and this Court, which has the same result.

> "[I]t is not the [subject of the perjury] but the alleged [perjury itself] that would make [the] evidence material[.]" *United States v White,* 972 F.2d 16, 20 (2nd Cir. 1992)

Of course, the prosecutor had no idea of the perjury, and Castro has not claimed otherwise. But,

> "It is indeed true that the police authorities are part of the prosecution; perjured testimony by

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[4] Castro's fifteen year old son was standing at the balcony next to agent Boulad during Castro's arrest. He saw both, the weapons pointing at Castro and agent Boulad observing the arrest.

> the police raises due process concerns whether or not the perjury is known to the prosecuting attorney." *United States v Snoody,* 862 F.2d 1154, 1156 (5th Cir. 1989)

Agents Ray and Boulad's testimony, by itself, was not central to Castro's conviction, but they presented what the prosecution called, among others, "Castro's confessions" about the purpose of his trip to Minneapolis. This was what the prosecution needed to corroborate, in part, Lynn Lowe's testimony, and give her the credibility that the government needed for the jury to believe her, and therefore convict Castro. And it worked. In this sense, Ray and Boulad's testimony was essential to Lynn Lowe's credibility.

If the jury would have known that both of these witnesses were committing perjury, their testimony would have been worthless, and Lynn Lowe's testimony, even without her own perjury, would have been largely uncorroborated, and there is a reasonable likelihood that the jury would have had enough doubts to reach a different result.

Conclusion

Castro's trial was tainted by the government's withholding of crucial impeaching evidence and by the perjury of the government witnesses that presented otherwise uncorroborated evidence about Castro's statements. This statements, both to Lynn Lowe and to the arresting officers were the sole support of Castro's convictions. An attack on the credibility of each of those witnesses could have resulted in a different result in Castro's trial. Castro

has presented to this Court compelling evidence of both, the suppression of material evidence by the government, and of the government's knowing use of prejured testimony. There is no other mean to remove the taint from Castro's trial than for this Court to order a new trial, or to dismiss Castro's indictment for government misconduct.

Respectfully submitted,

Date: September 4, 1994

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In Pro Se

EXHIBITS

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EXHIBIT 1

[19] you.

THE COURT: All right. Any objection to the exhibit?

MR. HUBBARD: I'm sorry.

THE COURT: Any objection to the exhibit?

MR. LLOYD: We would tender Government Exhibit 2.

MR. HUBBARD: The exhibit being tendered, it's my understanding that this came from Agent Ray. There's been no connection in the chain of custody.

MR. LLOYD: That's fine. I'm going to have Agent Ray testify.

THE COURT: All right. You may stand down.

(WITNESS WITHDREW FROM THE STAND)

THE COURT: Call your next witness.

MR. LLOYD: Call Lynn Lowe.

CLERK: Please state your full name, spell your last.

MS. LOWE: Lynn Lowe, L-o-w-e.

LYNN LOWE was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LLOYD:

Q Ms. Lowe, were you formerly married to Mike Lowe?

A Yes, I was.

Q I want to take you in time now to approximately 1987-[20]1988 time frame. Did your husband Mike Lowe get into some trouble with the authorities in West Virginia?

A Yes. He was indicted for cocaine possession with intent.

Q All right. At some point did you become familiar with him contacting Agent Doug Driver of the DEA in Denver?

A Yes.

Q And were you involved in discussions and do you know why he got in contact with Agent Driver?

A Well, he read about Agent Driver in the *Reader's Digest*, and called him and told him, you know, what he could do in the hopes that he would get a lighter sentence from the Court in the Southern District.

Q Where is Mike Lowe today?

A He's deceased.

Q Prior to his death, what was your marital status with him?

A Divorced.

Q Approximately when did you obtain the divorce?

A May, '92.

Q And approximately when did he die?

A December, '92.

Q Did you take any trips with Mike Lowe when he was your husband to Jamaica?

A No. We weren't married.

* * *

EXHIBIT 2

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

IRIAN LYNN LOWE

Plaintiff,

vs. CIVIL ACTION NO. 92-C-1792

MICHAEL GEORGE LOWE

Defendant.

COMPLAINT

Your Plaintiff, Irian Lynn Lowe, respectfully represents unto Your Honor as follows:

I

That the Plaintiff and the Defendant were legally and lawfully married on the 9th day of November, 1989, in

Catlettsburg, Kentucky, as will more fully and at large appear from the marriage records thereof

II

That the Plaintiff if a legal and bona fide resident and citizen of the State of West Virginia.

III

That the Defendant is a legal and bona fide resident and citizen of the State of Kentucky.

IV

That the Plaintiff and the Defendant last lived and cohabited together as husband and wife in Logan, Logan County, West Virginia, on or about the 21st day of November, 1989.

V

That neither the Plaintiff nor the Defendant is a member of the Armed Forces of the United States of America nor any of its allies.

VI

That the Defendant has been an incarcerated convict since the 21st day of November, 1989, and was sentenced to five (5) years and is currently in an Federal prison in Ashland, Kentucky.

VII

That no children were born of the marriage between the Plaintiff and the Defendant and the Plaintiff is not pregnant.

VIII

That all during her marriage to the Defendant, the Plaintiff has fully met and performed all the obligations required by the marriage relationship and has done all things to make the Defendant happy and to make their marriage a success.

IX

That irreconcilable differences have arisen between the Plaintiff and the Defendant within the meaning of Chapter 48, Article 2, Section 4, Subsection (a)(10) of the West Virginia Code of 1931, as amended.

X

That the Defendant subsequent to the marriage had, been convicted of the commission of a crime which is a felony, and such conviction has been final, within the meaning of Chapter 48, Article 2, Section 4, Subsection (a)(2) of the West Virginia Code of 1931, as amended.

XI

That the parties hereto will have by the time this matter can be heard will have lived separate and apart in separate places of abode without any cohabitation and without interruption for at least one (1) year within the

meaning of Chapter 48, Article 2, Section 4, Subsection (a)(7) of the West Virginia Code of 1931, as amended.

WHEREFORE, the Plaintiff, Irian Lynn Lowe, respectfully prays and demands:

1. That summons be duly issued, directed to the said Defendant;

2. That the Plaintiff be granted a judgment of absolute divorce from the Defendant;

3. That the Plaintiff be restored her former married name of Woolsey; and

4. That the Plaintiff may be granted such other and further relief as the Court may deem to be just and proper.

IRIAN LYNN LOWE

By Counsel

/s/ [Illegible]
J. Stephen Max
Counsel for the Plaintiff
405 Capitol Street, Suite 800
Charleston, West Virginia 25301

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

IRIAN LYNN LOWE, the Plaintiff named in the foregoing and hereto annexed Complaint, after being first duly sworn, upon her oath deposes and says that the facts and allegations contained therein are true, except insofar as they are therein stated to be upon information and

belief, and that insofar as they are therein stated to be upon information and belief, she believes them to be true.

/s/ Irian Lynn Lowe
Irian Lynn Lowe

Taken, subscribed, and sworn to before me this 21st day of April, 1992, by IRIAN LYNN LOWE.

My commission expires January 30, 2001.

/s/ [Illegible] D. Thayer

[SEAL] OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
[ILLEGIBLE] D. THAYER
[ILLEGIBLE]
My Commission Expires
January 30, 2001

EXHIBIT 3

Ln.	Date	Action/Results
1.	04/27/92	# ISSUED SUM & 1 CPY; F FEE, MAX FOR P; CK; RCPT 210426; $50.00
2.	04/27/92	# COMPLAINT
3.	06/04/92	$RESP TO C; LTR
4.	09/17/93	$LTR TO CLK FR CASTRO OTED 9/8/93.

C=CHG A=ADD F=FORWARD B=BACK 1-4=SCREEN D=DEL 9=MENU T=TRANS # CMD8=APP ACT S=SELECT

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	**No. CR491-142**
	)	
vs.	)	
HERNAN O'RYAN CASTRO	)	

ORDER AND MEMORANDUM

(Filed Oct. 28, 1994)

Currently before the Court is defendant Castro's motion for new trial pursuant to Federal rule of Criminal Procedure 33 filed July 11, 1994. The government's response was filed August 22, 1994, the defendant's reply was filed September 12, 1994. for the reasons set forth below, defendant's motion for a new trail is **DENIED**.

BACKGROUND

The grand jury indicted defendant Castro, along with several others, on September 3, 1991, for conspiracy to possess with intent to distribute cocaine and for conspiracy to import cocaine into the United States. A jury trial was held in the case from April 6, 1992, until April 10, 1992. Castro and two co-defendants tried with him were found guilty. Castro was sentenced on July 14, 1992, to 240 months on Counts 1 and 2 to be served concurrently. Castro appealed both his conviction and his sentence. These were affirmed by the Eleventh

Circuit Court of Appeals on March 24, 1994. *United States v. Taylor*, 17 F.3d 333 (11th Cir. 1994). Castro's petition for rehearing was denied by the Court of Appeals on May 11, 1994. Castro's petition for certiorari to the United States Supreme Court was denied on October 17, 1994. (No. 94-5623). The mandate was issued by the Court of Appeals on August 22, 1994.

The relevant facts are as follows. The defendant was a San Francisco drug trafficking representative for Junji Yamamoto, a Japanese national who was deported after serving time for drug trafficking. Yamamoto met Mike Lowe while they were incarcerated together. After his release from prison, Lowe was arrested again in 1987 for drug trafficking.

In order to benefit himself in the latest proceedings against him, Mike Lowe called Special Agent Doug Driver of the federal Drug Enforcement Agency and offered a connection to Yamamoto. In March, 1989, Lowe introduced Driver, who was posing as a businessman interested in purchasing large quantities of cocaine, to Yamamoto. Lowe was incarcerated on the drug trafficking charges in November, 1989. When Yamamoto began calling Lowe, his wife Lynn, at the direction of Driver, told him that her husband was hospitalized. In August, 1990, Yamamoto became suspicious and sent Castro to meet with Mike Lowe. Lynn Lowe met Castro at the airport and convinced him that a four hour round trip to the hospital would be a waste of time. Instead, Lowe and Castro talked at the airport. Castro was arrested at his home in California on August 5, 1991.

As part of Mike Lowe's plea agreement on the 1987 charges, Lynn Lowe was given a letter grant of testimonial immunity from the U.S. Attorney's office for the Southern District of West Virginia on November 16, 1987. Her grant of immunity extended to the government's use of her own testimony against her in any prosecutions in which she was involved in pursuant to the agreement. The government has asserted, and Castro has not disputed, that neither the prosecutor nor the case agents were aware of the immunity agreement at or during Castro's trial. The government became aware of the agreement in March, 1993, in Yamamoto's trial when the agreement was disclosed during Lynn Lowe's cross examination.

DISCUSSION

In his motion for new trial, defendant raises three grounds which he contends that he is entitled to a new trial based on newly discovered evidence. He asserts that the government failed to disclose exculpatory evidence in violation of *Brady* because of its failure to disclose Lynn Lowe's immunity agreement and her prior involvement in drug trafficking activities. Defendant further asserts that perjured testimony was allowed at his trial when Lowe testified that she had not been involved with drugs except for her knowledge with Michael Lowe. Defendant contends that Irvin Ray, Task Force Officer assigned to the Drug Enforcement Administration, committed perjury at trial when he testified that no weapons were drawn during Castro's arrest. In the government's response, the government asserts that is has no objection to defendant's motion for new trial being treated as demanding relief under both Rule 33

and 28 U.S.C. §2255. Accordingly, the Court will consider defendant's motion as requesting both kinds of relief.

The general standard for granting a new trial on the basis of newly discovered evidence is:

> (1) the evidence must be discovered following trial; (2) the movant must show due diligence to discover the evidence; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material to issues before the court; and (5) the evidence must be of such a nature that a new trial would probably produce a new result.

United States v. Bollinger, 796 F.2d 1394, 1401 (11th Cir. 1986) (citation omitted), *cert. denied*, 486 U.S. 1009 (1988). At a minimum, all of the defendant's newly discovered evidence fails to meet the third requirement of this standard. The immunity agreement, evidence of drug trafficking, and alleged perjured statements are made impeaching evidence. There are specific standards for *Brady* violations and for false testimony, however. Defendant's evidence will be examined using these standards as well.

A. Failure to Disclose Immunity Agreement

Petitioner contends that Lynn Lowe's immunity agreement and drug trafficking activities were wrongly suppressed by the government since they constituted exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). In order to make out a *Brady* violation, petitioner must show that:

> (1) that the government possessed evidence favorable to the defendant (including impeachment evidence;) (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

United States v. Spagnoulo, 960 F.2d 990, 994 (11th Cir. 1992) (quoting *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir.), *cert. denied*, 493 U.S. 932 (1989)). In the present case, the government concedes that the first three prongs of the test have been satisfied. The government argues, however, that the fourth prong has not been satisfied.

In order to meet the fourth requirement, defendant must show that there is a "reasonable probability" that the outcome of the trial would have been different. "A 'reasonable probability' is 'a probability sufficient to undermine confidence in the outcome' of the trial." *United States v. Garcia*, 13 F.3d 1464, 1472 (11th Cir. 1994) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2723 (1994). In the present case, it cannot be said that if the immunity agreement had been disclosed to the defendant, the outcome of the trial would have been different.

Any impeaching effect from the immunity agreement would have been minimal. Agent Driver corroborated Lowe's testimony by affirming the meeting between Lowe and Castro. Agent Boulad and Agent Ray both testified that after his arrest, Castro admitted to

meeting with a female in Minneapolis to negotiate a cocaine deal. Furthermore, Yamamoto's phone number was given to the agents by Castro at the time of his arrest. Lowe's testimony was therefore corroborated by other evidence. Accordingly, there is not a reasonable probability that the outcome of the trial would have been different and defendant is not entitled to a new trial based on this evidence.

In his reply brief, defendant Castro argues that not only did the government fail to disclose Lowe's immunity agreement but they also failed to disclose her drug trafficking activities involving transportation of drugs from Florida to West Virginia. The same analysis applied to the immunity agreement applies with equal force to any drug trafficking activity. It is merely minimal impeaching evidence and does not demonstrate a reasonable probability that the outcome of the trial would have been different.

B. Perjured testimony of Lynn Lowe

Defendant argues that Lynn Lowe committed perjury when she testified at his trial that her prior drug involvement was just her "knowledge" with her husband, Michael Lowe. Defendant asserts that because it came out at Yamamoto's trial in 1993 that Lowe had transported drugs from Florida to West Virginia, Lowe perjured herself at his trial in 1992.

If a defendant can show that the government's case included false testimony that the government knew or should have known of, a new trial must be held if there is a reasonable likelihood that the false testimony

affected the judgment of the jury. *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979).[1]

The government argues, and the Court agrees, Lynn Lowe did not testify falsely when she testified that her prior drug activities involved just her "knowledge" with Michael Lowe. At Yamamoto's trial, she was confronted by this previous testimony on cross-examination by Yamamoto's attorney. Lowe testified that she was not asked about the transportation of drugs in the 1992 trial. In any event, it appears undisputed that the transportation of drugs involved her husband Michael Lowe. Therefore, her testimony at defendant's trial was not false.

Even if Lowe's testimony was false, however, there is not a reasonable likelihood that the false testimony affected the judgment of the jury. The testimony could only have been used to impeach Lynn Lowe. As noted above, her testimony was corroborated by other testimony and by the statement of defendant Castro. Therefore, defendant is not entitled to a new trial based on the alleged perjury by Lynn Lowe.

C. Perjured Testimony of Irvin Ray

Defendant contends that Task Force Officer Irvin Ray committed perjury when he testified that no one pointed a gun at Castro during his arrest. Defendant

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[1] *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered before October 1, 1981.

contends that based on newly discovered evidence, the affidavit of Deborah J. Powers testifying that she saw guns drawn during the arrest, he is entitled to a new trial based on Ray's perjured testimony.

The evidence of Ray's alleged perjury is not newly discovered evidence for purposes of Rule 33. Presumably, defendant Castro knew at his trial whether guns were drawn during his arrest. His "newly discovered evidence" is merely that of a witness who could have been produced at trial. Furthermore, for purposes of 28 U.S.C. §2255, there is no evidence, newly discovered or otherwise, that Ray committed perjury. The affidavit only shows that another person could have testified to the contrary.

Finally, the Court finds that even if the motion were based on newly discovered evidence and even if the testimony was perjured, there is not a reasonable probability that the false testimony affected the judgment of the jury. It is immaterial whether weapons were drawn during Castro's arrest. The alleged false testimony may have had a very slight impeaching effect on Ray's testimony. It would have had no effect at all on the judgment of the jury in this case.

Accordingly,

IT IS HEREBY ORDERED that defendant Castro's motion for new trial be and is **DENIED**.

/s/ [Illegible]
UNITED STATES
DISTRICT JUDGE

Dated:

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA) CASE NO. CR491-142
)
VS)
)
CASTRO)

The undersigned, a regularly appointed and qualified deputy in the office of the Clerk of this district, while conducting the business of the court for said division, does hereby certify the following particulars:

1. Pursuant to instructions from the Court, and in the performance of my official duties, I personally placed in the United States Mail a sealed envelope bearing the lawful frank of the Court, and properly addressed to each of the persons, parties or attorneys named below; and

2. That the aforementioned envelopes contained a copy of the document known as Order & Memo dated 10/28/94, which is part of the official records of this case.

Date of Mailing: 10/28/94
Date of Certificate: 10/28/94

HENRY R. CRUMLEY, JR.,
CLERK

By: /s/ Michael [Illegible]
Deputy Clerk

CERT	Name	Address
_____	1. Hernan O'Ryan Castro, 73026-011, FCI Terminal	
_____	2. Island, P.O. Box 3007, San Diego, CA 90731-0207	
_____	3.	

_____ _____

_____ 4. _____

_____ 5. _____

_____ 6. _____

_____ 7. _____

_____ 8. _____

CERT	COPY	
_____	1	DISTRICT JUDGE
_____	_____	MAGISTRATE JUDGE
_____	_____	U.S. COURT OF APPEALS
_____	1	MINUTES
_____	_____	TICKLER
_____	_____	U.S. PROBATION
_____	_____	U.S. MARSHALS
_____	1	U.S. ATTORNEY
_____	_____	NICOLE
_____	_____	RAY

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-9270
Non-Argument Calendar

D. C. Docket No. CR491-142

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HERNAN O'RYAN CASTRO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia

(March 19, 1996)

Before DUBINA and CARNES, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

This is an appeal from the denial of relief in regard to a combined motion to vacate, set aside or correct sentence, 28 U.S.C. § 2255, and motion for new trial, Fed. R. Crim. P. 33. We affirm for the reasons set forth in the Order and Memorandum of the district court filed October 28, 1994. We also find no error in the denial of an evidentiary hearing.

Affirmed.

CV497-97

FORM FOR MOTIONS UNDER
28 U.S.C. SECTION 2255

Name HERNAN O'RYAN CASTRO

Prison Number 73026-011

Place of Confinement F.C.I. TERMINAL ISLAND, SAN PEDRO, CALIFORNIA

United States District Court SOUTHERN District of GEORGIA

Case No. _____ (to be supplied by Clerk of U.S. District Court)

United States,

v.

HERNAN O'RYAN CASTRO
(full name of movant)

(If movant has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

(1) This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need

be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

(7) When the motion is fully completed, the *original and two copies* must be mailed to the Clerk of the United States District Court whose address is, Post Office Box 8286, Savannah, Georgia 31412.

(8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack U.S.D.C. FOR THE SOUTHERN DISTRICT OF GEORGIA

2. Date of judgment of conviction JULY 14, 1992

3. Length of sentence 240 MONTHS OF IMPRISONMENT/ 10 YEARS S/R

4. Nature of offense involved (all counts) COUNT 1: CONSPIRACY TO POSS. W/INTENT TO DIST. MULTIKIGRAMS OF COCAINE, IN VIOLATION OF 21 USC §§ 841(a)(1) & 846, AND 18 USC § 2; COUNT 2: CONSPIRACY TO IMPORT MULTI-KILOGRAMS OF COCAINE, IN VIOLATION OF 21 USC §§ 960(a)(1) & 963, AND 18 USC § 2

5. What was your plea? (Check one)

   (a) Not guilty (X)
   (b) Guilty ( )
   (c) Nolo contendere ( )

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____
   _____
   _____
   _____
   _____

6. Kind of trial: (Check One)

   (a) Jury (X)
   (b) Judge only ( )

7. Did you testify at the trial? Yes ( ) No (X)

8. Did you appeal from the judgment of conviction?
   Yes (X) No. ( )

9. If you did appeal, answer the following:

   (a) Name of court USCA FOR THE 11TH CIRCUIT

   (b) Result CONVICTION AND SENTENCE AFFIRMED

   (c) Date of result MARCH 24, 1994

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions applications or motions with respect to this judgment in any federal court?
    Yes (X) No ( )

11. If your answer to 10 was "yes," give the following information:

(a)(1) Name of court U.S.D.C. SOUTHERN DISTRICT OF GA.

   (2) Nature of proceeding MOTION PURSUANT F.R.Cr.P., RULE 33

   (3) Grounds raised VIOLATION OF BRADY AND GIGLIO DOCTRINES

   (4) Did you receive an evidentiary hearing on your petition, application or motion?

   Yes ( ) No (X)

   (5) Result MOTION DENIED

   (6) Date of result OCTOBER 29, 1994

(b) As to any second petition, application or motion give the same information:

   (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No ( )

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No ( )

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First Petition, etc. Yes (X) No ( )

(2) Second petition, etc. Yes ( ) No ( )

(3) Third petition, etc. Yes ( ) No ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may

attach pages stating additional grounds and *facts* supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. *However, you should raise in this motion all available grounds* (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for *relief*, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an constitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT
Supporting FACTS (tell your story *briefly* without citing case or law): COUNSEL DID NOT MOVE TO SUPPRESS MOVANT'S POST-ARREST STATEMENTS WHICH WERE MADE IN VIOLATION OF MOVANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

B. Ground two: MOVANT WAS RENDEREED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT
Supporting FACTS (tell your story *briefly* without citing cases or law): COUNSEL DID NOT MOVE TO SUPPRESS MOVANT'S POST-ARREST STATEMENTS BASED ON THEIR INVOLUNTARINESS

C. Ground three: MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT
Supporting FACTS (tell your story *briefly* without citing cases or law): COUNSEL DID NOT OBJECT TO THE INTRODUCTION OF PREJUDICIAL CO-CONSPIRATOR'S STATEMENTS

MADE AFTER MOVANT'S WITHDRAWAL FROM THE CONSPIRACY

D. Ground four: MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT
Supporting FACTS (tell your story briefly *without* citing cases or law): COUNSEL DID NOT ARGUE AT SENTENCING THAT MOVANT HAD EFFECTIVELY WITHDRAWN FROM THE CONSPIRACY BEFORE THE INITIATION OF THE NEGOTIATIONS THAT RESULTED IN THE DELIVERY OF 16 KILOGRAMS OF COCAINE. FOR WHICH HE WAS HELD RESPONSIBLE

NOTE: FOR GROUNDS E-L, SEE ATTACHMENT

13. If any of the ground listed in 12A, B, C, and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: INEFFECTIVE ASSISTANCE OF COUNSEL (A-F, I, K AND L) NEWLY DISCOVERED EVIDENCE (G) NEWLY AVAILABLE OR DEVELOPED EVIDENCE (H AND J)

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ( ) No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing E. POMEROY WILLIAMS, P.O. BOX 2139 SAVANNAH, GA 31498-1001

(b) At arraignment and plea SAME

(c) At trial SAME

(d) At sentencing SAME

(e) On appeal SAME

(f) In any post-conviction proceeding PRO SE

(g) On appeal from any adverse ruling in a post-conviction proceeding PRO SE

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time? Yes (X) No. ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (X)

(a) If so, give name and location of court which imposed sentence to be served in the future:

_____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No ( )

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on 04/18/97
(date)

/s/ [Illegible]
Signature of Movant

ATTACHMENT TO 2255 MOTION – PAGE 1 OF 3

12. E. GROUND FIVE : MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT

COUNSEL DID NOT OBJECT TO THE INTRODUCTION OF PREJUDICIAL INADMISSIBLE HEARSAY EVIDENCE AT TRIAL

F. GROUND SIX : MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT

COUNSEL FAILED TO ARGUE ON DIRECT APPEAL THAT MOVANT COULD NOT BE HELD RESPONSIBLE FOR THE 16 KILOGRAMS OF COCAINE DISTRIBUTED BY OTHERS, BECAUSE THIS AMOUNT WAS NOT REASONABLE FORESEEABLE AND WITHIN THE SCOPE OF MOVANT'S CONSPIRATORIAL AGREEMENT

G. GROUND SEVEN : MOVANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND FIFTH AMENDMENT RIGHT TO DUE PROCESS WERE VIOLATED AT TRIAL

AT MOVANT'S TRIAL, THE GOVERNMENT KNOWINGLY PERMITTED SEVERAL OF ITS WITNESSES TO COMMIT PERJURY AND ALSO

KNOWINGLY WITHHELD MATERIAL IMPEACHING AND EXCULPATORY EVIDENCE

H. GROUND EIGHT : MOVANT'S SENTENCE WAS ENHANCED IN VIOLATION OF THE CONSTITUTION

AT MOVANT'S SENTENCING, HIS SENTENCE WAS ENHANCED BASED ON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION

I. GROUND NINE : MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT

MOVANT'S COUNSEL WAS INEFFECTIVE WHEN AT MOVANT'S TRIAL HE FAILED TO OBJECT TO A CO-DEFENDANT'S INVOCATION OF THE FIFTH AMENDMENT'S PROTECTION AGAINST SELF-INCRIMINATION, WHERE CO-DEFENDANT'S TESTIMONY, WHICH WOULD HAVE EVIDENCED THE EXISTENCE OF MULTIPLE CONSPIRACIES, WOULD HAVE BEEN LIMITED TO CONDUCT TO WHICH CO-DEFENDANT HAD PLED GUILTY, AND WHERE, IF NECESSARY, MOVANT WOULD HAVE ASKED FOR SEVERANCE FROM HIS OTHER TWO CO-DEFENDANTS JOINTLY TRIED

J. GROUND TEN : MOVANT WAS CONVICTED OF TWO OFFENSES OF WHICH HE IS FACTUALLY AND LEGALLY INNOCENT, CONSTITUTING A MISCARRIAGE OF JUSTICE

MOVANT'S CONVICTION WAS OBTAINED BECAUSE HE WAS UNABLE TO PRESENT TESTIMONIAL EVIDENCE BY TWO OF HIS CO-DEFENDANTS, ONE THAT WAS A FUGITIVE AT THE TIME OF THE TRIAL, AND ANOTHER WHO REFUSED TO TESTIFY, UNDER THE PROTECTION OF THE FIFTH AMENDMENT, WITNESSES

WHO WOULD HAVE PRESENTED COMPELLING AND UNDISPUTABLE EVIDENCE THAT MOVANT WAS FACTUALLY AND LEGALLY INNOCENT OF THE CRIMES OF CONVICTION

K. GROUND ELEVEN : THE LABORATORY ANALYSIS OF THE SUBSTANCE SEIZED WAS INACCURATE IN VIOLATION OF MOVANT'S DUE PROCESS RIGHT UNDER THE FIFTH AMENDMENT

THE LABORATORY ANALYSIS OF THE SUBSTANCE SEIZED IN THE INVESTIGATION WAS INACCURATE, BOTH, IN THE TYPE OF SUBSTANCE SEIZED, WHICH ACTUALLY WAS NOT A CONTROLLED SUBSTANCE, AND IN THE QUANTITY OF SUBSTANCE SEIZED

L. GROUND TWELFE : MOVANT WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT

MOVANT'S COUNSEL WAS INEFFECTIVE WHEN HE DID NOT CHALLANGE THE ACCURACY OF THE LABORATORY ANALYSIS OF THE QUANTITY AND TYPE OF SUBSTANCE SEIZED DURING THE INVESTIGATION OF THE CASE

DECLARATION

I, JUNJI YAMAMOTO, hereby declare, under penalty of perjury, that:

1. I am the Junji Yamamoto named in criminal case CR-491-142, from the United States District Court for the Southern District of Georgia.

2. On March 11, 1993, I was convicted of Conspiracy to Import Cocaine, Conspiracy to Possess Cocaine with Intent to Distribute, and two counts of Possession of Cocaine for Distribution.

3. I have personally known Hernan Castro since 1984.

4. I have personally known Carlos Chang-Tsutsumi since 1986.

5. I have never introduced Chang to Castro, nor have I ever mentioned or referred to Chang before Castro.

6. From early 1990 to the beginning of August 1990, and after repeated telephone calls from Michael Lowe requesting a meeting, I asked Castro to meet him, on my behalf, in Minneapolis, Minnesota.

7. On or about October ___, 1990, I met with Castro at my apartment in Panama City, Panama. During Castro's two-day stay in Panama City, we had a conversation about Castro's trip to Minneapolis, Minnesota, on August 11, 1990. Castro told me that Michael Lowe's wife, Lynn Lowe, whom he had met at the Minneapolis/St. Paul Airport, had told him that Michael Lowe was interested in obtaining a cocaine source for a customer.

8. In a telephonic conversation with Michael Lowe in early 1991, I told him that Castro was no longer involved in drug trafficking, as Castro had told me in his October 1990 visit to Panama City, Panama.

9. As far as I know, Castro played no part, nor had any interest in the negotiations, nor in the deliveries of cocaine made or caused to be made by Carlos Chang on April 11 and July 11, 1991, to Savannah, Georgia.

10. As far as I know, there were three separate efforts, through three entirely unrelated sources, to find a cocaine source of supply for DEA agent Douglas Driver: The alleged negotiations between Driver and Beatriz Lara-Aris in San Jose, Costa Rica, in December of 1989; Castro's alleged negotiations with Lynn Lowe, in Minneapolis, Minnesota, on August 11, 1990; and Chang's alleged negotiations with the Lowes and Driver, from April to July of 1991.

11. If called to testify, my testimony will reflect the above stated, which is true and correct to the best of my knowledge and belief.

~~Executed at the Federal Correctional Institution at Talladega, Alabama, this ___ day of the month of _____ of 1996.~~

/s/ Junji Yamamoto
Junji Yamamoto

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

HERNAN O'RYAN CASTRO, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	]]]]]]]]	CIVIL ACTION NO.: CV497-097 Underlying CR491-142

ORDER

(Filed Apr. 13, 1998)

After a careful review of the file, the Court concurs with the Magistrate Judge's Report and Recommendation, to which objections have been filed. The Court finds it appropriate to address whether the affidavit of Jungi Yamamoto supports Petitioner's claim of actual innocence because Petitioner withdrew from the conspiracy. Yamamoto's affidavit demonstrates that Petitioner negotiated with Lynn Lowe to supply cocaine for Agent Driver. (Yamamoto's Aff. ¶ 10.) Yamamoto claims that in early 1991, he told Agent Driver that Petitioner no longer engaged in drug trafficking. (Yamamoto's Aff. ¶ 8.) This statement does not demonstrate that Petitioner withdrew from the conspiracies to supply Agent Driver with cocaine. There is no evidence to suggest that Petitioner affirmatively communicated to Yamamoto, Lowe, Driver, or other members of the conspiracy that he no longer wished to participate in drug trafficking. He has not satisfied the legal requirements of withdrawal. *See United States v. Starrett*, 55 F.3d 1525, 1550 (11th Cir. 1995) (requiring co-conspirator to make reasonable effort to communicate withdrawal to co-conspirators).

Yamamoto's affidavit, at best, argues that the government proved the existence of multiple conspiracies and not one conspiracy. This argument was rejected by juries at Petitioner's trial and at Yamamoto's trial. Viewed in the light most favorable to the government, as required by *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2788-89, 61 L. Ed. 2d 560 (1979), Yamamoto's statement, "there were three separate efforts, through three entirely unrelated sources, to find a cocaine source of supply for DEA agent Douglas Driver," does not disprove the existence of a single conspiratorial goal to supply Agent Driver with cocaine. Each conspirator was linked to the conspiracy through Yamamoto. This "new evidence" fails to exculpate Petitioner, as the government proved that he conspired with Yamamoto in his scheme to import cocaine and distribute it to Agent Driver.

Accordingly, the Report and Recommendation of the Magistrate Judge, as clarified above, is adopted as the opinion of the Court. The petition for a writ of habeas corpus is **DENIED**.

SO ORDERED, this 13 day of April, 1998.

/s/ Anthony A. Alaimo
ANTHONY A. ALAIMO
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

CASTRO	:	
VS.	:	CASE NO.
USA	:	CV497-97 & CR491-142

The undersigned, a regularly appointed and qualified deputy in the office of the Clerk of this District, while conducting the business of the Court for said Division does hereby certify the following:

1: Pursuant to instructions from the Court, and in the Performance of my official duties, I personally placed in The U. S. Mail a sealed envelope bearing the lawful frank Of the Court, and properly addressed to each of the Persons, parties or attorneys named below; and

2: That the aforementioned envelope(s) contained a copy of The document dated April 13, 1998, which is a part of The official records of this case.

Date of mailing: April 13, 1998
Date of certificate: (x) same date

HENRY R. CRUMLEY, JR., CLERK

by /s/ [Illegible]

NAME:
1: HERNAN O'RYAN CASTRO, P. O. BOX 7001, TAFT, CA 92=3268
2: TERRY LEE LLOYD

___ District Judge
_x_ Magistrate Judge
_x_ Minutes

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 98-8751

HERNAN O'RYAN CASTRO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

---

(Filed Feb. 10, 1999)

ORDER:

Appellant's motion for certificate of appealability is GRANTED on the following issue only:

> Whether counsel was ineffective by not adequately arguing to suppress appellant's post-arrest statements.

No certificate of appealability should issue on the remaining issues appellant raises, because he failed to make a substantial showing of the denial of a constitutional right, *see* 28 U.S.C. § 2253(c)(2).

Appellant's motion for leave to proceed *in forma pauperis* on appeal is GRANTED.

/s/ R. LANIER ANDERSON, III
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
For the Eleventh Circuit

No. 98-8751
Non-Argument Calendar

District Court Docket Nos. 97-00097-4-CV,
CR491-142

HERNAN O'RYAN CASTRO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

Before ANDERSON, Chief Judge, EDMONDSON and HULL, Circuit Judges.

JUDGMENT

(Filed Jun. 13, 2000)

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby VACATED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court.

Entered: June 13, 2000
For the Court: Thomas K. Kahn, Clerk
By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: JUL 13 2000

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-8751
Non-Argument Calendar

D.C. Docket No. 97-00097-4-CV-
CR491-142

HERNAN O'RYAN CASTRO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(June 13, 2000)

Before ANDERSON, Chief Judge, EDMONDSON and HULL, Circuit Judges.

PER CURIAM:

Herman O'Ryan Castro appeals the denial of his *pro se* 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. On appeal Castro argues that the district court erred in finding his counsel was not ineffective by failing

to argue for suppression of his post-arrest statements because the post-arrest statements should have been suppressed and their suppression would have changed the outcome of the trial. Castro argues that after the officers read him is *Miranda* rights, he stated he wished to exercise these rights and such a statement was sufficient to assert his Sixth Amendment right to counsel. Castro also argues that use of his post-arrest statements violated his Sixth Amendment right to counsel because the officers continued to question him after he had asserted his rights and, even if he had not asserted his rights, he never effectively waived those rights. Castro's certificate of appealability limits his appeal to the issue of ineffective assistance of counsel.

In a § 2255 proceeding, we review legal issues *de novo* and factual findings for clear error. *United States v. Walker*, 198 F.3d 811, 813 (11th Cir. 1999). A claim for ineffective assistance of counsel presents a mixed question of law and fact and our review is plenary. *Vines v. United States*, 28 F.3d 1123, 1127 (11th Cir. 1994).

In order to succeed with a challenge based on ineffective assistance of counsel, a petitioner has to satisfy a two part test. First, the petitioner must show that counsel's performance was deficient. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). This means that the petitioner must show that the representation provided by counsel was outside the "wide range of competent assistance" and he must also overcome the presumption of competence. *Id.* at 690, 104 S. Ct. at 2066. In analyzing counsel's competence, the court must apply a "heavy measure of deference to counsel's judgments." *Id.* at 691, 104 S. Ct. at 2066. Second, the petitioner must show that the performance prejudiced the

defense, so that the result of the trial is not reliable. *See id.* To satisfy the test, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. Furthermore, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, *see id.*, or vice versa.

There are two sources of the right to counsel, the Fifth Amendment and the Sixth Amendment. The Sixth Amendment right attaches "at or after the initiation of adversary judicial proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *See United States v. Gouveia*, 467 U.S. 180, 188, 104 S. Ct. 2292, 2297 (1984) (internal quotations omitted). While this right can be waived, the burden is on the government to show that this was "an intentional relinquishment or abandonment of a known right or privilege." *Stokes v. Singletary*, 952 F.2d 1567, 1578 (11th Cir. 1992). Waiver of the right must be "voluntary, knowing and intelligent," and the determination of voluntariness depends on "the particular facts and circumstances of each case." *Id.* If after the Sixth Amendment right to counsel attaches one asserts a right to counsel, a subsequent waiver of the right is presumed invalid, even if it was given voluntarily, knowingly, and intelligently when it was secured pursuant to police-initiated conversation. *See Michigan v. Jackson*, 475 U.S. 625, 636, 106 S. Ct. 1404, 1411 (1986).

Here, the court below found that Castro could not satisfy the prejudice prong of the standard for ineffectiveness assistance of counsel. However, it appears that the court did not apply the Sixth Amendment analysis and examined the facts only in reference to the Fifth Amendment law. As conceded by the United States, Castro's Sixth Amendment right to counsel attached when he was arrested because he was indicted before his arrest. Additionally, it appears that the court below did not hold an evidentiary hearing, which would have facilitated the determination of voluntariness. Similarly, the appointment of counsel for Castro would assist the court. Finally, there is some question of whether this petition is successive. Accordingly, we vacate the decision of the court below and remand with instructions to the court to employ Sixth Amendment analysis, develop more fully the facts surrounding Castro's claim and examine the record to determine if this petition is successive.

VACATED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

HERNAN O'RYAN CASTRO,	)	
Petitioner,	)	CIVIL ACTION NO.:
v.	)	CV497-097
UNITED STATES OF AMERICA,	)	(CASE NO.: CR491-142)
Respondent.	)	

ORDER

(Filed Jan. 30, 2001)

Let a copy of this Report and Recommendation be served upon the parties. The parties will be allowed ten (10) days from the date of service of this Report and Recommendation to file objections. If no objections are made, this Report and Recommendation will be adopted as a record of the proceedings and may become the opinion and order of the Court. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982).

All requests for additional time to file any objections to this Report and Recommendation should be filed with the Clerk for consideration by the District Judge to whom this case is assigned for his determination.

The Clerk of Court is directed to submit the Report and Recommendation with objections, if any, on the 19th day of February, 2001.

SO ORDERED, this 30th day of January, 2001.

/s/ James E. Graham
JAMES E. GRAHAM
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

HERNAN O'RYAN CASTRO,	)	
Petitioner,	)	CIVIL ACTION NO.:
v.	)	CV497-097
UNITED STATES OF AMERICA,	)	(CASE NO.: CR491-142)
Respondent.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed Jan. 30, 2001)

Petitioner Hernan O'Ryan Castro, an inmate at the Federal Correctional Institution in Taft, California, filed a *pro se* Motion pursuant to 28 U.S.C. § 2255 contesting the legality of his confinement. (2255 Dkt. No. 1.) Respondent filed a Response to the Motion and Petitioner subsequently filed a Traverse to the Response. (2255 Dkt. Nos. 4; 20; 21.) On February 24, 1998, after carefully considering the pleadings, the undersigned issued a Report and Recommendation recommending that Petitioner's Motion be denied on its merits. (2255 Dkt. No. 25.) Petitioner filed objections to the Report and Recommendation, which the Court addressed in its April 13, 1998 Order adopting the Report and Recommendation. (2255 Dkt. No. 29.) Thereafter, Petitioner filed an appeal to the Eleventh Circuit Court of Appeals. (2255 Dkt. No. 32.) On appeal, the Eleventh Circuit vacated the District Court's Order denying Petitioner's Motion

and remanded the case for a determination of whether Petitioner had filed a successive petition. (2255 Dkt. No. 40.) The Eleventh Circuit also instructed the Court to (1) more fully develop the facts supporting Petitioner's claim that he had been denied effective assistance of counsel through his counsel's failure to move to suppress his post-arrest statements under the Sixth Amendment, and (2) analyze Petitioner's claim under the Sixth Amendment. (*Id.*)

Respondent then filed a Motion to Dismiss Petitioner's § 2255 Motion, asserting that it is a successive petition under the Antiterrorism and Effective Death Penalty Act,[1] ("AEDPA") as codified at 28 U.S.C. § 2255 (2255 Dkt. No. 44.) Petitioner filed a Response to Respondent's Motion to Dismiss. (2255 Dkt. No. 47.) In compliance with the instructions by the Eleventh Circuit, the undersigned appointed counsel to represent Petitioner and held an evidentiary hearing on September 29, 2000. Following the evidentiary hearing, Petitioner's counsel and Respondent filed post-hearing Briefs. (2255 Dkt. Nos. 51; 55.) Petitioner then filed a Supplemental Brief on his own behalf. (2255 Dkt. No. 56; 57.) Respondent filed a Response to Petitioner's

[1] Petitioner filed the instant section 2255 motion on April 18, 1997, the date he signed his motion in preparation for mailing it to the Court. *Adams v. United States*, 173 F.3d 1339, 1341 (11th Cir. 1999) (holding that "a pro se prisoner's motion to vacate is deemed filed the date it is delivered to prison authorities for mailing."). As Petitioner filed his motion after the April 24, 1996 enactment date of the AEDPA, its provisions are applicable to the motion, even though Petitioner's first § 2255 was adjudicated prior to the enactment of the AEDPA. *Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir. 1996).

Supplemental Brief. (2255 Dkt. No. 58.) As the undersigned has determined that Petitioner's Motion is successive, the merits of his Sixth Amendment claim will not be addressed.

STATEMENT OF THE CASE

Petitioner is confined as a result of an April 1992 conviction obtained in this Court for conspiracy to possess with intent to distribute cocaine and to distribute cocaine and conspiracy to import cocaine. On July 14, 1992, Petitioner was sentenced to 240 months' imprisonment. Petitioner subsequently appealed his conviction and sentence. In its March 24, 1994 decision, the Eleventh Circuit Court of Appeals affirmed Petitioner's conviction and sentence. *United States v. Taylor*, 17 F.3d 333 (11th Cir. 1994).

On July 11, 1994, Petitioner filed a motion for a new trial based on newly discovered evidence that the Government had entered into an immunity agreement with a witness that testified against Petitioner at his trial. (Crim. Dkt. Nos. 333; 334.) In his motion, Petitioner first alleged that the Government's failure to disclose the immunity agreement violated the doctrines set forth in *Brady v. Maryland* and *Giglio v. United States*. (Crim. Dkt. No. 334.) Additionally, Petitioner asserted that the Government knowingly used perjured testimony to obtain his conviction. (Crim. Dkt. No. 334.) In its response to Petitioner's motion for a new trial, the Government indicated that it did not object to Petitioner's motion being construed as both as motion for a new trial under Federal Rule of Criminal Procedure 33 and a *habeas corpus* motion to vacate his sentence under 28 U.S.C. § 2255. (Crim. Dkt.

No. 340.) Petitioner filed a reply to the Government's response, in which he stated that he properly filed his motion for a new trial under Federal Rule of Criminal Procedure 33. (Crim. Dkt. No. 346.) However, Petitioner did not object to the Government's suggestion that his motion be construed as one under Rule 33 and 28 U.S.C. § 2255. (*Id.*)

In an order denying Petitioner's motion for a new trial, the District Court considered Petitioner's motion as requesting relief under both Rule 33 and 28 U.S.C. § 2255. (Crim. Dkt. No. 352.) Petitioner appealed the denial of his motion to the Eleventh Circuit Court of Appeals, asserting that the District Court erroneously denied his motion for a new trial and failed to hold an evidentiary hearing on his motion. (Pet'r Appellate Br., Ex C. to Resp't Post-Hearing Br.) However, Petitioner did not appeal the District Court's ruling on his motion under both Rule 33 and 28 U.S.C. § 2255. (*Id*; Pet'r Reply Br., Ex. E to Resp't Post-Hearing Br.) In its opinion affirming the District Court's denial of Petitioner's motion, the Eleventh Circuit Court of Appeals stated that the appeal arose "from the denial or relief in regard to a combined motion to vacate, set aside or correct sentence, 28 U.S.C. § 2255, and motion for a new trial, Fed. R. Crim. P. 33." (Crim. Dkt. No. 367.)

DISCUSSION AND CITATION OF AUTHORITY

In 1996, Congress amended 28 United States Code § 2255 to reduce the number of successive petitions filed by inmates. Section 2255, as amended by the AEDPA, permits a successive petition to be brought in a district court by an inmate only after a panel of the court of appeals certifies that the successive petition contains (1)

newly discovered evidence that would support a determination that no reasonable factfinder would have found the petitioner guilty or (2) a new rule of constitutional law made retroactive by the United States Supreme Court to cases on collateral review. 28 U.S.C. § 2255; *see In re Medina*, 109 F.3d 1556, 1564 (11th Cir. 1997) (holding that a successive *habeas corpus* petition that is filed in the district court prior to obtaining authorization from the court of appeals for the filing of said petition must be dismissed.).

Respondent has moved to dismiss this § 2255 motion, asserting that it is successive and that Petitioner failed to seek and obtain authorization from the Eleventh Circuit Court of Appeals prior to filing it. Respondent asserts that the Sixth Amendment claim raised by Petitioner in this motion could have been raised in his first § 2255 motion. Therefore, Respondent alleges that the Sixth Amendment claim cannot be raised in a successive petition without proper certification by the Eleventh Circuit. Petitioner disputes that his instant § 2255 motion is successive under the AEDPA. Specifically, Petitioner asserts that he filed his motion for a new trial pursuant only to Federal Rule of Criminal Procedure 33 and the Court improperly construed his motion as one under 28 U.S.C. § 2255, as he did not raise any constitutional claims in his motion for a new trial.

The filing of a motion for a new trial under Federal Rule of Criminal Procedure 33 "does not preclude consideration of the motion as a petition for relief under the federal habeas corpus statute," especially where the claim raised by a movant implicates his constitutional rights. *United States v. Dibernardo*, 880 F.2d 1216, 1226 (11th Cir. 1989). Claims for a new trial based on the prosecutor's

failure to disclose exculpatory evidence and the use of perjured testimony implicate the right to due process. *Giglio v. United States*, 405 U.S. 150, 151-53, 92 S. Ct. 763, 764-66, 31 L. Ed. 2d 104 (1972); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963). Therefore, these claims may properly be brought in a *habeas corpus* motion. *See, e.g., DeMarco v. United States*, 928 F.2d 1074, 1075 (11th Cir. 1991); *Boschen v. United States*, 845 F.2d 921, 922 (11th Cir. 1988).

In the case *sub judice*, the District Court properly construed Petitioner's motion as both a motion for a new trial under Federal Rule of Criminal Procedure 33 and a 28 U.S.C. § 2255 motion. In his motion, Petitioner asserted his right to a new trial based on alleged constitutional violations by the Government during his trial. Specifically, Petitioner alleged that the Government violated the rules enunciated in *Brady* and *Giglio* when it failed to disclose exculpatory evidence and used perjured testimony. As such, Petitioner's claims were based on his constitutional right to due process and were more properly raised in a 28 U.S.C. § 2255 motion.

The failure of Petitioner's trial counsel to move to suppress his post-arrest statements, which Petitioner seeks to raise in his current § 2255 motion, was a claim available to Petitioner at the time he filed his initial motion for a new trial. Petitioner was well aware of the circumstances surrounding his post-arrest statements prior to his trial and the filing of his motion. Furthermore, Petitioner had an opportunity to raise this claim during the adjudication of his motion for a new trial, either in his reply to the Government's response or on appeal of the denial of his motion. As Petitioner failed to raise this claim in his motion for a new trial, which was properly

construed to also include § 2255 claims, he cannot now bring this claim in a successive motion without proper authorization from the Eleventh Circuit Court of Appeals. Because Petitioner filed his successive *habeas corpus* petition in this Court prior to obtaining authorization from the Eleventh Circuit Court of Appeals, his petition should be dismissed.

CONCLUSION

For the above and foregoing reasons, it is my **RECOMMENDATION** that Respondent's motion to dismiss be **GRANTED**. Petitioner's motion to vacate, set aside, or correct his sentence, filed pursuant to 28 U.S.C. § 2255, should be **DISMISSED**.

SO REPORTED and **RECOMMENDED**, this 30th day of January, 2001.

/s/ James E. Graham
JAMES E. GRAHAM
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

HERNAN O'RYAN CASTRO,	)	
Petitioner,	)	CIVIL ACTION NO.:
v.	)	CV497-097
UNITED STATES OF AMERICA,	)	(CASE NO.: CR491-142)
Respondent.	)	

ORDER

(Filed Apr. 11, 2001)

After a careful review of the file, the Court concurs with the Magistrate Judge's Report and Recommendation, to which objections have been filed. In his Objections to the Magistrate Judge's Report and Recommendation, Petitioner asserts that the Magistrate Judge erroneously concluded that his motion to vacate his sentence, filed pursuant to 28 U.S.C. § 2255, is successive because this Court improperly construed an earlier pleading filed under Federal Rule of Criminal Procedure 33 as a motion under § 2255. Petitioner cites for the first time in his Objections several circuit court cases that have held that a district court may not *sua sponte* re-characterize a pleading filed by a *pro se* prisoner as one brought pursuant to 28 U.S.C. § 2255 unless the prisoner (1) consents to the re-characterization with knowledge of the consequences of re-characterizing his pleading under § 2255, or (2) is permitted to amend the pleading to raise all his claims or withdraw the pleading

prior to said re-characterization. *See United States v. Kelly*, 235 F.3d 1238, 1242 (10th Cir. 2000); *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2000); *United States v. Evans*, 224 F.3d 670, 674-75 (7th Cir. 2000); *United States v. Miller*, 197 F.3d 644, 652 (3rd Cir. 1999); *Adams v. United States*, 155 F.3d 582, 584 (2d Cir. 1998). Petitioner urges this Court to adopt the reasoning in these cases that the re-characterization of a pleading as a § 2255 motion without notice to or the consent of the prisoner has unfair consequences under the Antiterrorism and Effective Death Penalty Act ("AEDPA"): namely that such re-characterization bars the prisoner from brining another § 2255 motion raising additional constitutional claims.

The Eleventh Circuit Court of Appeals has yet to address this issue. However, this Court finds that the cases relied on by Petitioner are in opposite to the case *sub judice* for several reasons. First, Petitioner was put on notice by the Government's response to his motion for a new trial, filed under Federal Rule of Criminal Procedure 33, that his motion should be construed as a motion under § 2255 because of the constitutional claims that Petitioner raised in his motion. Second, Petitioner never objected to the characterization of his motion as one under § 2255, a fact that is distinguishable from the prisoners in both *Adams* and *Miller*. *See Miller*, 197 F.3d at 647; *Adams*, 155 F.3d at 583. Finally, the concerns expressed in the circuit court cases cited above, which supports the courts' holdings, that it is unfair to re-characterize a prisoner's pleading as a § 2255 motion because of the AEDPA's limitation on successive petitions are not supported by legal precedent. Contrary to the court's assertions that the AEDPA has caused severe consequences by limiting

successive petitions, common law precedent, prior to the AEDPA, placed the same restrictions on successive petitions as that stated in the AEDPA. *Kelly*, 235 F.3d at 1242 n.4 (noting that "succcessiveness concerns predate AEDPA, which essentially codified the successiveness rule."). The AEDPA merely codified the pre-existing law. As Petitioner states in his Objections, pre-AEDPA law "would have prevented movant from filing a section 2255 presenting other claims known at the time." Because Petitioner may have known of the consequences of having his motion for a new trial construed as a § 2255 motion and was put on notice of said re-characterization, the Magistrate Judge correctly concluded that Petitioner's current § 2255 motion is successive.

Petitioner has not presented any evidence to support his allegations that the Magistrate Judge's findings were erroneous. Accordingly, the Report and Recommendation of the Magistrate Judge is adopted as the opinion of the Court. The motion for a writ of *habeas corpus* is **DISMISSED**.

SO ORDERED, this 11th day of April, 2001.

/s/ Anthony A. Alaimo
ANTHONY A. ALAIMO
JUDGE, UNITED STATES
DISTRICT JUDGE

United States District Court
Southern District of Georgia

HERNAN O'RYAN CASTRO v. UNITED STATES OF AMERICA	JUDGMENT IN A CIVIL CASE CASE NUMBER: CV 497-097/CR 491-142

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to the Court's Order of April 11, 2001, adopting the Magistrate Judge's Report and Recommendations, Petitioner's Motion for a Writ of Habeas Corpus filed pursuant to Title 28, United States Code, Section 2255, is DISMISSED.

April 11, 2001
Date

/s/ Henry R. Crumley, Jr.
Clerk

/s/ Jan Purvis
(*By*) *Deputy Clerk*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

HERNAN O'RYAN CASTRO,	)	
Petitioner,	)	CIVIL ACTION NO.: CV497-097
v.	)	
UNITED STATES OF AMERICA,	)	(CASE NO.: CR491-142)
Respondent.	)	

Certificate of Appealability/
Probable Cause to Appeal

(Filed Apr. 25, 2001)

Pursuant to 28 U.S.C. § 2253(c), an appeal may not be taken in this matter unless the Court issues a Certificate of Appealability. This certificate may issue only if Petitioner has made a substantial showing of the denial of a constitutional right, and (if granted) the certificate must indicate which specific issue or issues satisfy this showing. In accordance with the foregoing, a Certificate of Appealability is hereby

X **GRANTED** ___ **DENIED**

for the following reasons and (if granted) with respect to the following issue(s): *Whether the 28 U.S.C. § 2255 petition filed by Castro is a successive petition.*

Transcripts of Proceedings

X This Court will not presently require the preparaction of a transcript or the payment therefor by the United States. To the extent that a transcript of any portion of the District Court proceedings is required, the Court of Appeals may more economically direct which proceedings it requires to be transcribed.

X The Court Reporter shall transcribe the proceedings as requested by the party *in forma pauperis* and the United States shall bear the expense.

SO ORDERED, this 25 day of April, 2001.

/s/ Anthony A. Alaimo
ANTHONY A. ALAIMO
JUDGE, UNITED STATES
DISTRICT JUDGE

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-12181

D. C. Docket No. 97-00097-CV-4

HERNAN O'RYAN CASTRO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(January 2, 2002)

Before WILSON, RONEY and FAY, Circuit Judges.

WILSON, Circuit Judge:

Hernan O'Ryan Castro appeals the district court's dismissal of his habeas corpus petition, which was filed pursuant to 28 U.S.C § 2255. The district court concluded that the petition was successive under § 2255, as amended by the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), and thus not entitled to consideration. The dismissal of O'Ryan Castro's petition raises an issue of first impression in this Circuit: when a district court recharacterizes a federal prisoner's postconviction motion

as a petition under § 2255, does that render the prisoner's subsequent attempt to file a § 2255 petition a "second or successive petition" within the purview of AEDPA amendments? Finding some of the opinions of our sister circuits who have considered this issue to be persuasive, we hold that O'Ryan Castro's subsequent § 2255 petition cannot be deemed successive.

I. BACKGROUND

In 1992, O'Ryan Castro was convicted and sentenced to twenty years of imprisonment for conspiracy to possess with the intent to distribute cocaine in violation of 21 U.S.C. § 846, possession with the intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), and conspiracy to import cocaine in violation of 21 U.S.C. § 963. We affirmed the convictions and sentence on March 24, 1994. On July 11, 1994, O'Ryan Castro filed a pro se Motion For New Trial pursuant to Federal Rule of Criminal Procedure 33 based upon newly discovered evidence. The evidence consisted of proof that a witness, who testified against him at trial, had entered into an immunity agreement with the government. The government submitted a response in which it stated that it did not object to the motion as demanding relief under both Rule 33 and § 2255. O'Ryan Castro then filed a pro se reply in which he explained that he had filed his motion properly under Rule 33. The district court treated O'Ryan Castro's motion as requesting relief pursuant to both Rule 33 and § 2255 and denied it on October 28, 1994. We affirmed the district court's ruling.

On April 22, 1997, O'Ryan Castro filed his first self-styled § 2255 habeas petition, alleging, among other

things, that he failed to receive effective assistance of counsel in violation of the Sixth Amendment. The district court denied this petition and O'Ryan Castro appealed. After granting a certificate of appealability on the ineffective assistance claim, we vacated the order denying his petition and remanded the matter for further evidentiary determinations. We also instructed the district court to examine the record to determine whether O'Ryan Castro's petition was successive. The district court concluded that the petition was successive and dismissed it due to his failure to meet the particular requirements imposed by the amendments to § 2255 regarding successive petitions.

II. STANDARD OF REVIEW

"We review de novo a district court's denial of habeas corpus relief." *Dorsey v. Chapman,* 262 F.3d 1181, 1185 (11th Cir. 2001). "A district court's factual findings in a habeas corpus proceeding are reviewed for clear error." *Id.*

III. DISCUSSION

Due to the frequency in which pro se litigants draft incognizable motions, "[f]ederal courts have long recognized that they have an obligation to look behind the label of a motion filed by a *pro se* inmate and determine whether the motion is, in effect, cognizable under a different remedial statutory framework." *United States v. Jordan,* 915 F.2d 622, 624-25 (11th Cir. 1990). This accommodation was the result of the time-honored practice of construing pro se plaintiffs' pleadings liberally. *See Haines v. Kerner,* 404 U.S. 519, 520 (1972) (per curiam). In accordance with this practice, "district courts routinely convert postconviction motions of prisoners who

unsuccessfully seek relief under some other provision of law into motions made under . . . § 2255 and proceeded to determine whether the prisoner was entitled to relief under that statute." *Adams v. United States,* 155 F.3d 582, 583 (2d Cir. 1998) (per curiam). These conversions were justified because they were harmless and they also assisted prisoner-movants in dealing with legal technicalities that might otherwise preclude prompt adjudication of their claims. *Id.* "Several courts of appeals . . . have endorsed this approach as fair and efficient." *United States v. Miller,* 197 F.3d 644, 648 (3d Cir. 1999).

On April 24, 1996, however, the AEDPA took effect and significantly altered the innocuousness of liberally recharacterizing a petitioner's postconviction motion. The AEDPA, which amended § 2255, bars federal prisoners from attacking their convictions through successive habeas corpus petitions except in very limited circumstances.[1] Specifically, successive applications may be heard only after an appellate court certifies the petition, because it contains "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

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[1] "A 'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition." *Kuhlmann v. Wilson,* 477 U.S. 436, 444 n.6 (1986). A petitioner abuses the writ when he "files a petition raising grounds that were available but not relied upon in a prior petition." *Id.*

28 U.S.C. § 2255. "If a district court receiving a motion under some other provision of law elects to treat it as a motion under § 2255 and then denies it, that may cause the movant's subsequent filing of a motion under § 2255 to be barred as" successive. *Adams,* 155 F.3d at 583. Consequently, a "court's act of conversion which we approved under pre-AEDPA law because it was useful and harmless might, under AEDPA's new law, become extraordinarily harmful to a prisoner's rights." *Id.* at 583-84.

O'Ryan Castro filed his initial Rule 33 motion[2] prior to the enactment of the AEDPA and his subsequent § 2255 petition after the AEDPA became effective. Despite the fact that O'Ryan Castro filed his Rule 33 motion before the AEDPA's effective date, it nonetheless has the capacity to trigger the procedural strictures that the AEDPA attaches to successive habeas petitions. *See Raineri v. United States,* 233 F.3d 96, 99 (1st Cir. 2000). This raises the question of whether the district court properly considered O'Ryan Castro's Rule 33 motion as his first § 2255 petition, making his subsequent § 2255 petition successive.

Several circuits have prescribed specific guidelines for construing a claimant's self-styled § 2255 petition when a district court has recharacterized a claimant's prior postconviction motion as a § 2255 petition. The First Circuit, in particular, decided a case that is strikingly similar to the present case. The petitioner in *Raineri,* like O'Ryan Castro, brought a "Motion for Correction of Sentence and/or New Trial" pursuant to Federal Rule of Criminal Procedure 35 and/or Rule 33 prior to the

[2] The district court converted this motion into a § 2255 petition.

AEDPA's effective date. *Id.* at 98. The district court, acting sua sponte, found Rules 33 and 35 inapplicable and recharacterized the motion as an application for relief under § 2255. *Id.* The petitioner submitted a subsequent motion styled as a § 2255 petition that the district court deemed successive and thus dismissed for his failure to obtain the requisite authorization to proceed with a successive petition. *Id.* at 99. In reversing this dismissal, the First Circuit concluded that "because the court acted sua sponte and without any advance notice to the petitioner, [it could not] treat the earlier pleading as a 'first' habeas petition for AEDPA purposes." *Id.* at 100-01. In reaching this decision, the First Circuit, persuaded by holdings of the Second and Third Circuits in prior cases, gave due consideration to the importance of protecting a claimant's right to habeas review. *Id.* at 99-101.

Two years before the First Circuit decided *Raineri,* the Second Circuit held,

> At least until it is decided whether such a conversion or recharacterization can affect the movant's right to bring a future habeas petition, district courts should not recharacterize a motion purportedly made under some other rule as a motion made under § 2255 unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized, or (b) the court finds that, notwithstanding its designation, the motion should be considered as made under § 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than have it so recharacterized.

Adams, 155 F.3d at 584. Similarly, the Third Circuit, "conclude[d] that district courts should discontinue their practice of automatically treating pro se, postconviction motions as § 2255 petitions." *United States v. Miller,* 197 F.3d 644, 652 (3d Cir. 1999). The Third Circuit, however, went a step further than the procedure announced by the Second Circuit, stating that

> upon receipt of pro se pleadings challenging an inmate's conviction or incarceration – whether styled as a § 2255 motion or not – a district court should issue a notice to the petitioner regarding the effect of his pleadings. This notice should advise the petitioner that he can (1) have his motion ruled upon as filed; (2) if his motion is not styled as a § 2255 motion have his motion recharacterized as a § 2255 motion and heard as such, but lose his ability to file successive petitions absent certification by the court of appeals; or (3) withdraw the motion, and file one all-inclusive § 2255 petition within the one-year statutory period.

Id. It also held that this rule was narrow and would apply prospectively – meaning that "a pro se petitioner who filed a pre-AEDPA pleading, which was recast as a § 2255 motion, is bound by the existing provisions of AEDPA regarding successive second or successive petitions." *Id.*[3]

In addition to the First Circuit, the Seventh, Ninth, and Tenth Circuits have adopted the views expressed by

[3] We should note that the petitioners in both *Adams* and *Miller* filed their initial postconviction motions after the effective date of the AEDPA. *Adams,* 155 F.3d at 582-83; *Miller,* 197 F.3d at 652-53.

the Second and Third Circuits. *See Henderson v. United States,* 264 F.3d 709, 711 (7th Cir. 2001) (holding that a court should not deem a Rule 33 or other mislabeled motion a § 2255 motion "unless the movant has been warned about the consequences of his mistake"); *United States v. Kelly,* 235 F.3d 1238, 1242 (10th Cir. 2000) ("[w]e hold that district courts should use the procedure adopted in *Adams* for dealing with pro se postconviction motions not expressly made under § 2255 . . . ."); *United States v. Seesing,* 234 F.3d 456, 464 (9th Cir. 2000) (adopting the procedure set forth in *Adams* to address circumstances where a court is presented with a pro se motion that could be recharacterized as a § 2255 motion).

Only one circuit has taken an opposite approach on this issue. In *In re Tolliver,* 97 F.3d 89, 90 (5th Cir. 1996) (per curiam), which was the first case to address this issue, the Fifth Circuit upheld the district court's unilateral recharacterization of the petitioner's previous pro se motion as a § 2255 motion and held that, because the petitioner had filed such a motion, any subsequent § 2255 motion he filed required certification by a court of appeals. The court also determined that despite the petitioner's objection to the district court's conversion of his initial postconviction motion, the motion was incapable of being construed as anything other than a § 2255 motion. *Id.* In discussing *Tolliver,* the Third Circuit noted that the case "was decided two years before *Adams* and almost immediately after AEDPA's enactment." *Miller,* 197 F.3d at 651. It opined that the Fifth Circuit may have decided the case differently if it had the benefit of the Second Circuit's discussion. *Id.* We find this assertion remarkably plausible, because we certainly are persuaded by the courts that have discussed this issue since *Tolliver.*

Unlike the petitioner in *Tolliver,* O'Ryan Castro's Rule 33 motion for a new trial asserted a cognizable ground for relief. The motion was based upon alleged new evidence, which Rule 33 explicitly provides as a basis for bringing such a motion. *See United States v. Kersey,* 130 F.3d 1463, 1465 n.2 (11th Cir. 1997). In response to the government's motion, the district court considered the motion as requesting relief under both Rule 33 and § 2255. Thus, also unlike *Adams, Miller,* and *Raineri,* the district court acted on the government's motion, and not sua sponte. This, however, is a distinction without a difference. The more critical factor is whether O'Ryan Castro knew the consequences of the district court's actions; and much the same as the litigants in *Adams, Miller, Henderson,* and *Raineri,* there was no protocol in place to ensure that O'Ryan Castro had such knowledge. Because O'Ryan Castro filed his initial postconviction motion pre-AEDPA, it is inconceivable that he, or any pro se litigant during that time, could have foreseen the ultimate consequences of a district court's recharacterization (sua sponte or upon the government's motion) of his postconviction motion. When the district court recharacterized his Rule 33 motion, O'Ryan Castro made the effort to reply in a manner that reaffirmed his intent to move for a new trial under that rule rather than seek habeas relief. It is therefore probable, not just possible, to conclude that he would have mounted a much stronger campaign to defeat the district court's recasting of his Rule 33 motion if he was aware that his subsequent § 2255 petition would face nearly insurmountable scrutiny.

In sum, we join the majority of circuits that have addressed this issue. Whether a petitioner's initial postconviction motion was filed before or after the AEDPA's

effective date or whether the district court's recharacterization of that motion was sua sponte or upon the government's motion, a district court's recharacterization of a petitioner's initial postconviction motion will not be considered a "first" habeas petition for AEDPA purposes unless the petitioner is given notice of the consequences of such recharacterization. Requiring a district court to ensure that a petitioner realizes the ramifications of a court's decision to convert his postconviction motion is an appropriate means of apprizing all defendants of the circumstances that may impair or preserve their right to habeas review. We do not endeavor to burden the district courts with onerous disclosure requirements. As long as a petitioner is not blindsided by having to meet the new criteria in § 2255 for successive petitions, the district court's obligation is satisfied.

IV. CONCLUSION

The district court's dismissal of O'Ryan Castro's § 2255 petition is hereby VACATED. We find that O'Ryan Castro's § 2255 petition is not successive and REMAND this case to the district court to consider the merits of his petition.

VACATED and **REMANDED**.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12181

D. C. Docket No. 97-00097-CV-4

HERNAN O'RYAN CASTRO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(May 7, 2002)

Before WILSON, RONEY and FAY, Circuit Judges.

WILSON, Circuit Judge:

We vacate our prior opinion, which was reported at 277 F.3d 1300, and substitute this opinion in its place.

Hernan O'Ryan Castro appeals the district court's dismissal of his habeas corpus petition, which was filed pursuant to 28 U.S.C. § 2255. The district court concluded that the petition was successive under § 2255, as amended by the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), and thus not entitled to consideration.

The dismissal of O'Ryan Castro's petition raises an issue of first impression in this Circuit: when a district court recharacterizes a federal prisoner's postconviction motion as a petition under § 2255, does that render the prisoner's subsequent attempt to file a § 2255 petition a "second or successive" petition within the purview of the AEDPA amendments? We hold that under the AEDPA, O'Ryan Castro's subsequent § 2255 petition was properly deemed successive. However, due to the strict limitations the AEDPA imposes on petitioners who wish to file successive § 2255 petitions, we suggest that in the future, when a district court unilaterally recharacterizes a prisoner's pleading as a § 2255 petition, the judge should also warn the petitioner of the consequences of this recharacterization – that this recharacterized petition may be his first and only chance to seek relief under § 2255.

BACKGROUND

In 1992, O'Ryan Castro was convicted and sentenced to twenty years of imprisonment for conspiracy to possess with the intent to distribute cocaine in violation of 21 U.S.C. § 846, possession with the intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), and conspiracy to import cocaine in violation of 21 U.S.C. § 963. We affirmed the convictions and sentence on March 24, 1994. On July 11, 1994, O'Ryan Castro filed a pro se Motion For New Trial pursuant to Federal Rule of Criminal Procedure 33 based upon newly discovered evidence. The evidence consisted of proof that a witness, who testified against him at trial, had entered into an immunity agreement with the government. The government submitted a response in which it stated that it did not object to the motion as demanding relief under both Rule 33 and § 2255. O'Ryan

Castro then filed a pro se reply in which he explained that he had filed his motion properly under Rule 33. The district court treated O'Ryan Castro's motion as requesting relief pursuant to both Rule 33 and § 2255 and denied it on October 28, 1994. We affirmed the district court's ruling.

On April 22, 1997, O'Ryan Castro filed his first self-styled § 2255 habeas petition, alleging, among other things, that he failed to receive effective assistance of counsel in violation of the Sixth Amendment. The district court denied this petition and O'Ryan Castro appealed. After granting a certificate of appealability on the ineffective assistance claim, we vacated the order denying his petition and remanded the matter for further evidentiary determinations. We also instructed the district court to examine the record to determine whether O'Ryan Castro's petition was successive. The district court concluded that the petition was successive and dismissed it due to his failure to meet the particular requirements imposed by the amendments to § 2255 regarding successive petitions.

STANDARD OF REVIEW

"We review de novo a district court's denial of habeas corpus relief." *Dorsey v. Chapman,* 262 F.3d 1181, 1185 (11th Cir. 2001), *cert. denied*, ___ U.S. ___ (2002). "A district court's factual findings in a habeas corpus proceeding are reviewed for clear error." *Id.*

DISCUSSION

When O'Ryan Castro filed his motion for new trial pursuant to Rule 33 based upon newly discovered evidence, the district court recharacterized his Rule 33

motion as both a motion for a new trial and a § 2255 motion. As the district court explained, O'Ryan Castro's claims were based upon his constitutional right to due process and were more properly raised in a § 2255 petition.

District courts have always had the power to recharacterize pro se petitioners' motions. In fact, due to the frequency in which pro se litigants draft incognizable motions, "[f]ederal courts have long recognized that they have an obligation to look behind the label of a motion filed by a *pro se* inmate and determine whether the motion is, in effect, cognizable under a different remedial statutory framework." *United States v. Jordan,* 915 F.2d 622, 624-25 (11th Cir. 1990). This accommodation was the result of the time-honored practice of construing pro se plaintiffs' pleadings liberally. *See Haines v. Kerner,* 404 U.S. 519, 520 (1972) (per curiam). In accordance with this practice, "district courts routinely convert post-conviction motions of prisoners who unsuccessfully [seek] relief under some other provision of law into motions made under . . . § 2255 and proceed to determine whether the prisoner was entitled to relief under that statute." *Adams v. United States,* 155 F.3d 582, 583 (2d Cir. 1998) (per curiam).

In this particular case, the district court recharacterized O'Ryan Castro's motion as both a Rule 33 motion and § 2255 petition in 1994. The AEDPA took effect approximately two years later, on April 24, 1996. The AEDPA, which amended § 2255, bars federal prisoners from attacking their convictions through successive habeas corpus petitions except in very limited circumstances. 28 U.S.C. § 2255. Specifically, successive applications may be heard only after an appellate court certifies the petition, because it contains:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255.

In 1997, a year after the AEDPA was enacted, O'Ryan Castro filed a § 2255 petition, arguing ineffective assistance of counsel. Despite the fact that O'Ryan Castro filed his first recharacterized Rule 33 and § 2255 petition before the AEDPA's effective date, we must apply the restrictions set forth under the AEDPA. Congress made no exceptions for those who had filed their § 2255, petitions before the AEDPA was enacted and were now filing their second petitions after the effective date of the AEDPA. Therefore, a second petition has the capacity to trigger the procedural strictures that the AEDPA attaches to successive habeas petitions. *See Raineri v. United States,* 233 F.3d 96, 99 (1st Cir. 2000). "If a district court receiving a motion under some other provision of law elects to treat it as a motion under § 2255 and then denies it, that may cause the movant's subsequent filing of a motion under § 2255 to be barred as" successive under the AEDPA. *Adams*, 155 F.3d at 583.

In this case, the ineffective assistance of counsel claim was available to O'Ryan Castro at the time he filed his initial motion for new trial, and he had an opportunity to raise this claim during the adjudication of his recharacterized § 2255 petition. Therefore, this subsequent § 2255

petition, filed three years later, is successive because it does not meet either of the two requirements found under the AEDPA – O'Ryan Castro's second petition does not contain newly discovered evidence,[1] nor does the second petition address a new rule of constitutional law.

While we must follow the restrictions on successive petitions as laid out by the AEDPA and find O'Ryan Castro's petition successive under the AEDPA, we can suggest that in the future, district courts should warn petitioners of the consequences of recharacterzing their motions as § 2255 petitions. We have substantial fairness concerns with the result in this case. These same fairness concerns have been articulated by the First Circuit in *Raineri*. 233 F.3d at 99.

The petitioner in *Raineri*, like O'Ryan Castro, brought a Motion for Correction of Sentence and/or New Trial pursuant to Federal Rule of Criminal Procedure 35 and/or Rule 33 prior to the AEDPA's effective date. *Id.* at 98. The district court, acting sua sponte, found Rules 33 and 35 inapplicable and recharacterized the motion as an application for relief under § 2255. *Id.* The petitioner submitted a subsequent motion styled as a § 2255 petition, which the district court deemed successive and thus dismissed for failure to obtain the requisite authorization to proceed with a successive petition. *Id.* at 99. In reversing this dismissal, the First Circuit concluded that "because the court acted sua sponte and without any advance notice to

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[1] According to the magistrate judge, O'Ryan Castro was "well aware of the circumstances surrounding his post-arrest statements prior to his trial and the filing of his motion."

the petitioner, [it could not] treat the earlier pleading as a 'first' habeas petition for AEDPA purposes." *Id.* at 100-01. The court held "that when a district court, acting sua sponte, converts a post-conviction motion filed under some other statute or rule into a section 2255 petition without notice and an opportunity to be heard (or in the alternative, the pleader's informed consent), the recharacterized motion ordinarily will not count as a 'first' habeas petition sufficient to trigger AEDPA's gatekeeping requirements." *Id.* at 100.

We are constrained, in this Circuit, to disagree with the holding in *Raineri* because of our view that Congress, in enacting the AEDPA, imposed further restrictions on a prisoner's ability to file a second § 2255 petition. *Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("The [AEDPA] also codifies some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners."). Thus, if we were to relieve an entire class of petitioners from any restriction at all on the filing of a second motion simply because their first motions had been recharacterized, we might undermine the congressional purpose behind the AEDPA, which is to limit successive § 2255 petitions. Without being given any additional instruction by Congress on this particular matter, we must apply the AEDPA restrictions to successive § 2255 petitions and find O'Ryan Castro's petition successive.[2]

[2] Incidentally, Congress could have made an exception to the AEDPA rules involving second motions and petitions for this set of circumstances, but it did not do so. The rule as written by Congress applies across the board to all second filings, except in the two carefully

(Continued on following page)

However, we agree with the First Circuit's remarks that a district court should not "extinguish the petitioner's one clear chance at habeas relief under the AEDPA" without the petitioner's informed consent. *Raineri*, 233 F.3d at 100. Therefore, we feel we must note that in *future* cases where the petitioner is *not* filing a second petition, but rather is asking to *withdraw* his motion or to *include additional claims* after a district court has decided to recharacterize the initial motion as a § 2255 petition, we would agree with a clear majority of the circuits that district courts should warn prisoners of the consequences of recharacterization and provide them with the opportunity to amend or dismiss their filings. *United States v. Miller*, 197 F.3d 644, 652 (3d Cir. 1999) (stating that "upon receipt of pro se pleadings challenging an inmate's conviction or incarceration – whether styled as a § 2255 motion or not – a district court should issue a notice to the petitioner regarding the effect of his pleadings. This notice should advise the petitioner that he can (1) have his motion ruled upon as filed; (2) if his motion is not styled as a § 2255 motion have his motion recharacterized as a § 2255 motion and heard as such, but lose his ability to file successive petitions absent certification by the court of appeals; or (3) withdraw the motion, and file one all-inclusive § 2255 petition within the one-year statutory period."); *Adams*, 152 F.3d at 584 (holding that "[a]t least

limited, narrow circumstances that are specified in the statute. *See* 28 U.S.C. § 2255. Therefore, we cannot substitute our judgment regarding this matter for that expressed by Congress and must apply the AEDPA to all petitioners whether or not their initial recharacterized § 2255 petitions were filed before or after the AEDPA was enacted.

until it is decided whether such a conversion or recharacterization can affect the movant's right to bring a future habeas petition, district courts should not recharacterize a motion purportedly made under some other rule as a motion made under § 2255 unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized, or (b) the court finds that, notwithstanding its designation, the motion should be considered as made under § 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than have it so recharacterized"); *see also Henderson v. United States*, 264 F.3d 709, 711 (7th Cir. 2001) (holding that a court should not deem a Rule 33 or other mislabeled motion a § 2255 motion "unless the movant has been warned about the consequences of his mistake"); *United States v. Kelly*, 235 F.3d 1238, 1242 (10th Cir. 2000) ("[W]e hold that district courts should use the procedure adopted in *Adams* for dealing with pro se post-conviction motions not expressly made under § 2255. . . . "); *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2000) (adopting the procedure set forth in *Adams* to address circumstances where a court is presented with a pro se motion that could be recharacterized as a § 2255 motion).

Therefore, we conclude that under the AEDPA's strict limitations, O'Ryan Castro's petition is successive. However, in the future, we urge district courts to be aware of these substantial fairness concerns and warn petitioners of the consequences of the recharacterization of their filings as § 2255 petitions.

CONCLUSION

The district court's dismissal of O'Ryan Castro's § 2255 petition is hereby affirmed. We find that O'Ryan Castro's § 2255 petition is successive.

AFFIRMED.

RONEY, Circuit Judge, dissenting:

I respectfully dissent. I would reverse the dismissal of Castro's section 2255 motion as successive and remand for consideration on the merits following the reasoning of the First Circuit's opinion in *Raineri v. United States*, 233 F. 3d 96 (1st Cir. 2000).

The decision here is in direct conflict with *Raineri*, the only case cited directly addressing a pre-AEDPA motion that was "converted" to a section 2255 motion, followed by a post-AEDPA section 2255 motion. On facts very similar to these, the *Raineri* court held that a *sua sponte* recharacterization ordinarily will not count as a first petition and remanded the case back to the district court for consideration of Raineri's section 2255 motion on the merits. *See also* cases involving post-AEDPA converted motions: *Adams v. United States*, 155 F.3d 582 (2d Cir. 1998) (movant must know of potential adverse consequences of recharacterization and be given the opportunity to withdraw motion); *United States v. Miller*, 197 F.3d 644 (3d Cir. 1999) (court must issue notice of the effect of recharacterization and offer the opportunity to withdraw motion); *United States v. Seesing*, 234 F.3d 456 (9th Cir. 2000) (movant must know consequences of recharacterization, or the purpose of aiding *pro se* petitioner is frustrated); *United States v. Kelly*, 235 F.3d 1238 (10th Cir. 2000) (following *Adams*); *Henderson v. United States*, 264 F.3d

709, 711 (7th Cir. 2001) (even though the district court converted and denied a Rule 33 motion, "we won't deem a Rule 33 (or other mislabeled motion) a section 2255 motion unless the movant has been warned about the consequences of his mistake.")

The Fifth Circuit case of *In Re Tolliver*, 97 F.3d 89 (5th Cir. 1996), involved a post-AEDPA, not a pre-AEDPA "converted" motion, in which the petitioner had received full relief on his prior motion, relief which could have been granted only upon a "conversion" to a § 2255 motion, and relief which the petitioner readily accepted.

We have found no case in which a pre-AEDPA motion that was "converted" by the court and then denied barred a second post-AEDPA § 2255 motion.